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No. 04-

IN THE

Supreme Court of the United States

KAREN GUIDI, individually and as Executrix of the Estate of ROBERT L. GUIDI, EVE HOFFMAN, individually and as Executrix of the Estate of COBY M. HOFFMAN, MERRILL KRAMER and LOIS KRAMER,

Petitioners,

v.

INTER-CONTINENTAL HOTELS CORPORATION, a Delaware Corporation, INTER-CONTINENTAL HOTELS CORPORATIONS, a Corporation of the United Kingdom,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners Guidi and Hoffman are the widows of two Americans murdered by a terrorist gunman who entered the Cairo Inter-Continental Hotel and began shooting hotel guests; Petitioners also include a third American who was critically wounded in the same shooting. Respondents are the U.K hotel corporation that managed the Egyptian hotel and was responsible for hotel security, and its U.S. subsidiary. Federal jurisdiction is based on alienage (*i.e.*, diversity of national citizenship) as well as diversity of state citizenship.

Two other hotel guests, residents of Italy and France, were murdered in the same shooting. Their families brought wrongful death actions in the Egyptian courts which held the hotel management liable under Egyptian law based on findings that it was negligent. Petitioners thereupon sought to rely on those findings to collaterally estop Respondents on the factual issue of negligence. Collateral estoppel was denied because the courts decided that *Erie v. Tompkins* prohibited application of federal common law estoppel rules and instead required application of forum state rules governing the preclusive effect to be accorded to a foreign country decision in state court.

The core question presented is whether *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), categorically prohibits a federal court from applying federal common law rules to determine the issue preclusive effect of a foreign country decision. More specifically, the questions are:

1. whether *Erie* automatically and invariably requires application of forum state issue preclusion standards as the Second Circuit held; in contrast, the Third

Circuit holds that *Erie* requires a balancing of federal and forum state interests in the choice-of-law decision;

2. whether *Erie* and the Rules of Decision Act technically apply in diversity suits like this one – where the cause of action in negligence arises exclusively under the substantive negligence laws of the foreign country where the alleged negligence occurred.

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Karen Guidi, Eve Hoffman, and Merrill and Lois Kramer respectfully petition this Court for a writ of certiorari to review the judgment of the United State Court of Appeals for the Second Circuit.

OPINIONS BELOW

The decision of the Court of Appeals is reported at 119 Fed. Appx. 332, and 2005 U.S. App. LEXIS 91, and is reproduced at App. 1a. (References to the Appendices to this Petition are styled "App. __ a.") The opinion of the trial court denying Petitioners' motion to grant partial summary judgment on the basis of collateral estoppel is reported at 2002 U.S. Dist. LEXIS 14833 (August 12, 2002) and is reproduced at App. 6a. The judgment of the trial court dismissing Petitioners' claim is reproduced at App. 4a.

STATEMENT OF JURISDICTION

On January 4, 2005, the Court of Appeals affirmed the district court's judgment dismissing Petitioners' complaint. Petitioners filed a timely petition for rehearing *en banc* on January 18, 2005, which the Court of Appeals denied on March 15, 2005. *See* App. 61a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Rules of Decision Act, 28 U.S.C. § 1652, reads as follows:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

STATEMENT OF THE CASE

1. Proceedings Through The Denial of Collateral Estoppel

This wrongful death and personal injury suit in federal court arose under the substantive negligence laws of Egypt – where a terrorist gunman entered the Cairo Inter-Continental Hotel in October 1993 and opened fire on a group of American citizens and other hotel guests who were dining in the hotel restaurant. Petitioners are residents of Maryland and New Jersey, and federal jurisdiction is based on alienage (i.e., diversity of national citizenship) as well as diversity of state citizenship inasmuch as Respondents are the U.K. hotel corporation responsible for managing the hotel and its U.S. subsidiary headquartered in New York.

Petitioners Guidi and Hoffman are the widows of two American businessmen who were murdered in the attack. Two other hotel guests, citizens of Italy and France who were attending an international law conference at the hotel, were also murdered in the attack. Petitioner Kramer, an American, was critically wounded in the attack and survived.

Petitioners brought suit in federal district court in New York on October 20, 1995. On November 28, 1996, more than a year later, the families of the Italian and French victims brought their suits in the Egyptian courts.

On September 9, 1996, before the Egyptian suits had been filed, Respondents moved to dismiss the federal suit under *forum non conveniens*, urging that the litigation proceed, if at all, in the Egyptian courts. The district court dismissed Petitioners' case on that basis but the Second Circuit reversed. *Guidi v. Inter-Continental*, 224 F.3d 142 (2d Cir. 2000).

Following the reinstatement of Petitioners' case but before trial commenced below, the Egyptian trial and appellate courts

reached verdicts in negligence against the hotel management in the two lawsuits brought in Egypt. Three trial judges and three appellate judges found that the hotel management was negligent in not searching or scanning visitors (i.e., non-guests) for concealed weapons. The Egyptian courts noted that Egypt was experiencing terrorist attacks at the time and that the hotel was a potential target because it was hosting an international conference. (Appellants' Appendix at A-77, A-86.) Based on the Egyptian negligence findings Petitioners sought to collaterally estop Respondents from relitigating the negligence issue in federal court.

The district court denied collateral estoppel. The court held (1) that it was required by *Erie v. Tompkins* to apply forum state rules to determine the issue preclusive effect of the Egyptian judicial findings, (2) that the forum state courts would recognize the Egyptian judgments as conclusive between the parties thereto, (3) that the forum state courts would not grant greater preclusive effect, for the benefit of Petitioners who were not parties to the Egyptian decisions, than could be enjoyed by Petitioners in the foreign rendering jurisdiction, (4) that the foreign rendering jurisdiction would not grant collateral estoppel for the benefit of Petitioners, because they were not parties to the Egyptian litigation, and (5) that it was irrelevant whether another Egyptian doctrine (such as civil law rules governing precedent) would grant a preclusive effect comparable to collateral estoppel.

It was not disputed that this lack of "full identity of parties" or "mutuality" would not have barred estoppel under federal rules[1], or under New York rules that would have applied to a domestic judgment.[2]

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1. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

2. Petitioners' motion argued that collateral estoppel was warranted under New York collateral estoppel rules and would (Cont'd)

2. The New York Trial

Because the denial of collateral estoppel was not a final order it was not appealable and the case proceeded to trial. The jury returned a verdict for the Respondents.[3]

3. The Appeal to the Second Circuit

Petitioners appealed to the Second Circuit on two grounds.

First and foremost, Petitioners argued that the district court had improperly denied collateral estoppel. In that regard,

(Cont'd)
also be warranted under federal common law rules, neither of which required "mutuality of estoppel" as Egyptian law did. (Appellants' Appendix at A-94). On appeal, Petitioners argued that the district court had misconstrued New York law but that the best that could be said for Respondents' view of New York law was that it was unsettled. Accordingly Petitioners argued that the courts could apply federal common law "gap filling" rules "like those set forth in *Alfadda* or by Chief Justice Burger's concurring opinion in *Marrese*." Petitioners' Reply Brief at 16.

3. Appellate review of erroneous denials of issue preclusion is necessary and appropriate even though a subsequent trial has been held reaching a different outcome from the decision sought to be relied upon. *Butler v. Pollard*, 800 F.2d 223, 225 (10th Cir. 1986); *Unger v. Consolidated Foods Corp.*, 693 F.2d 703, 705 (7th Cir. 1982). Otherwise, there could be a recurring issue that would tend to avoid review, since the estoppel issue would obviously not be appealed by either party if the second trial reached the same result as the first. As the Seventh Circuit explained, "The fact that the case went to trial is itself of no consequence. The denial of the collateral estoppel motion to dismiss is not a collateral order appealable under 28 U.S.C. § 1291; appeal of the district judge's decision had to await the end of the trial."

Petitioners argued (1) that the district court had misconstrued applicable New York law, (2) that the best that could be said for Respondents' view of New York law was that the issue was unsettled, and (3) that in a case of unsettled forum state law the Court of Appeals should apply federal common law estoppel rules as recommended by Chief Justice Burger's concurrence in *Marrese*. Petitioners argued that the *Marrese* standard was satisfied because neither Respondents on appeal, nor the district court in its opinion, asserted that Respondents had not enjoyed a "full and fair opportunity" in the Egyptian proceeding. Petitioners argued accordingly that, if they prevailed on the choice-of-law issue, the case should be reversed with instructions to enter summary judgment for Petitioners on the issue of liability.

Respondents strongly objected to the argument that the Court of Appeals could apply federal common law or rely on federal common law decisions.

Petitioners also argued, in the alternative, that there were prejudicial trial errors warranting a new trial.[4]

4. Petitioners argued that the "harm" caused by the trial errors was clear from the different outcomes of the Egyptian and New York decisions. Petitioners pointed out that in the Egyptian proceedings the core finding of negligence was that the hotel management should have used metal detectors or other means of searching or scanning for concealed weapons. The Egyptian courts had rejected the hotel's argument that such scanning was illegal under general Egyptian law governing hotel security. In the New York trial the district court allowed Respondents' lay witnesses to testify, over objection, that using metal detectors was illegal under general Egyptian law. The judge then instructed the jury that the jury could decide the *legal* question of whether Respondents were blameless because Egyptian law allegedly banned the use of metal detectors. The Court of Appeals found these errors to be "harmless".

The Court of Appeals, in a brief summary opinion, affirmed the district court's denial of collateral estoppel as having "no error" and held that the asserted trial errors were "harmless". Petitioners filed a petition for rehearing *en banc* that was denied on March 15, 2005.

REASONS FOR GRANTING THE PETITION

I. Certiorari Should Be Granted To Resolve The Conflict Between The Second And Third Circuits On Whether *Erie v. Tompkins* Categorically Bars A Federal Diversity Court From Applying Federal Common Law Rules To Determine The Issue Preclusive Effect Of A Foreign Country Judgment

a. Overview

This case presents an issue very similar to that resolved in *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001). In *Semtek* the Court resolved a conflict over whether *state or federal law* governs the preclusive effect of a decision rendered by a federal court sitting in diversity. Here the issue is whether *state or federal law* governs the preclusive effect of a decision rendered by the courts of a foreign country.

The argument for certiorari here is actually far more compelling than in *Semtek*. Before *Semtek*, courts of appeals took different positions on the choice-of-law issue, but the law in most circuits was clear. Indeed, the petition for certiorari in *Semtek* suggested that it was more important simply to resolve the conflict of the circuits one way or the other than it was to resolve it in any particular way.

This case is far different. The problem warranting certiorari is the particular approach taken below – and the ongoing burden that will be imposed on federal courts if the Second Circuit's approach is not corrected.

The burden of the decision below is an extremely cumbersome and ultimately unworkable process for determining whose rules are applicable to determine the preclusive effect of a foreign country decision. Although the Second Circuit decision "automatically" applies forum state law, there is nothing "automatic" about what follows from that decision. To the contrary, referring to state law in this area puts the federal courts in a morass. State law is chronically unclear on the question of whether domestic forum state rules, or foreign rules, determine the preclusive effect in state court of a foreign judgment. In addition, even where state law is found or assumed to refer to foreign law, foreign law must then be ascertained. Finally, foreign preclusion law and forum state law must be compared to determine if a true conflict exists. Beyond the burden of going through such an analysis in all cases, there is the additional burden of an unnecessary trial if it is ultimately determined that preclusion would have been granted under federal rules but cannot be granted under forum state rules that incorporate foreign rules.

In contrast, under the Third Circuit's view federal courts would clearly have the authority to apply federal common law preclusion rules where the federal interest in controlling the preclusion issue overrides any interest of the forum state. Where a *foreign country* decision is involved, the forum state has no interest at all in controlling the issue preclusion decision in federal court. In addition, given the importance of collateral estoppel as a tool of judicial self-regulation and self-management, the "interests of the federal forum in self-regulation, administrative independence, and self-management are more important than any interest in uniformity between the federal and state forums within a particular state." 17A-124 Moore's Federal Practice-Civil § 124.07.

The issues are clear cut, they are clearly presented in this case, and they are issues of serious practical importance. Thus, there is nothing to be gained from delay in alleviating the burdens on the federal courts that are created by the Second Circuit's approach.

b. The Importance of Collateral Estoppel To The Federal Courts

Collateral estoppel, or issue preclusion, is an important tool for managing the caseload of the federal courts. The doctrine precludes a party that previously lost a factual issue in a prior judicial proceeding from relitigating the identical factual issue in the federal courts. Beyond its value in promoting judicial economy, collateral estoppel helps to minimize the real or perceived injustice of unexplainably inconsistent verdicts on the identical factual issues.

Collateral estoppel is fully applicable in federal courts to judgments rendered by courts of other jurisdictions, including the courts of foreign countries. Although the judicial systems of foreign countries may not follow the same procedures as federal courts, the rights of the party to be estopped are fully protected by the "full and fair opportunity" rule. Collateral estoppel cannot be granted unless the party to be estopped enjoyed a "full and fair opportunity" to litigate in the prior proceeding.

In federal question cases the preclusive effect of a prior foreign country decision is determined under federal common law issue preclusion rules – not the issue preclusion rules of the foreign rendering jurisdiction.[5] Thus, even if estoppel could not

5. *See, e.g., Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 293 F. Supp. 892, 908 (S.D.N.Y. 1968) (noting that federal courts

(Cont'd)

be granted in the courts of the foreign country for some technical reason – such as the absence of "mutuality of estoppel" or "full identity of parties" – it can still be imposed under federal common law rules in a federal question case. Such a fact pattern is described with evident approval by the Restatement of Foreign Relations:

> For instance, if an action growing out of an airline disaster is brought in foreign state A, and in that action the airline has been determined to have been negligent, a plaintiff in an action in the United States might be able to rely on that determination, even if the law of [foreign] state A would require full identity of parties before giving preclusive effect to the determination in the first action. Restatement, 3d, Foreign Relations Law of the U.S. § 481.

The issue here is whether the same approach should apply for federal diversity cases. That is, whether a federal diversity

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(Cont'd)

would not be prevented from according preclusive effect to West German judgment merely because West German courts would not give such effect to them), *aff'd*, 433 F.2d 686 (2d Cir. 1970), *cert. denied*, 403 U.S. 905, 29 L. Ed. 2d 680, 91 S. Ct. 2205 (1971); *Alfadda v. Fenn*, 966 F. Supp. 1317 (S.D.N.Y. 1997), *aff'd on other grounds*, 159 F.3d 41 (2d Cir. 1998). This result is consistent with *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 390-91 (1985), since the basis for reversing the view of the Seventh Circuit and other courts, that federal common law should determine the preclusive effect of a *state* decision in a federal question case, was the overriding mandate of the full-faith-and-credit statute. That statute plainly does not apply to displace federal common law in the case of foreign country decisions.

court should also be permitted to apply federal rules to determine the preclusive effect of a foreign country decision, even if a state court arguably would not grant estoppel because state judicial policies deferred to the more restrictive preclusion rules of the foreign rendering jurisdiction.

Resolution of this *Erie* question would complete the Court's work of recent years clarifying the framework of interjurisdictional preclusion issues for federal courts. Indeed, after the decisions in *Marrese* and *Semtek*, this case presents the only significant interjurisdictional fact pattern for federal courts that the Court has not addressed, either expressly or impliedly. *Marrese v. American Academy of Orthopaedic Surgeons* 470 U.S. 373 (1985) *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001).[6] Given the increasingly interrelated world economy, the growing importance of interjurisdictional and international preclusion, and the particularly burdensome consequences of asking federal courts

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6. The Court's decisions in *Marrese* and *Semtek* clarified (1) that the full-faith-and-credit statute requires federal courts in all cases to determine the preclusive effect of state court decisions under the rendering state court's rules, (2) by negative implication, that federal courts in federal question cases may use federal common law rules to determine the preclusive effect of non-state decisions (including foreign country decisions) since those decisions are not covered by the full-faith-and-credit statute; and (3) that state and federal courts must generally determine the preclusive effect of federal diversity decisions as if they had been rendered by a state court of the rendering court's forum state, except where federal interests dictate a different result. The only remaining interjurisdictional fact pattern for federal courts not addressed is that presented here: the preclusive effect of a foreign country decision in a federal diversity case.

to apply chronically uncertain forum state rules, the choice-of-preclusion-law issues here merit review.[7]

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7. A leading commentator in the area explains the growing problem:

> Res judicata is hard enough already. Consider it at the interjurisdictional level, and we are asking for headaches. But consider it at that level we must, because litigation trends make interjurisdictional preclusion more important than ever. Lawyers, judges, litigants, and other litigation participants increasingly must contemplate the possibility that a lawsuit will have claim-preclusive or issue-preclusive effect in a subsequent suit in another jurisdiction.
>
> With great frequency, multiple lawsuits arise out of single or related transactions or events. Mass tort litigation and complex commercial litigation provide the most emphatic examples, but the phenomenon of multiple related lawsuits extends to every corner of litigation, . . .
>
> The participants in those multiple related lawsuits, moreover, increasingly find themselves litigating in far-flung forums. With continuing advances in transportation and communication, growing nationalization and internationalization of commerce, and an increasingly mobile society resulting in geographically dispersed family and business networks, it is hardly surprising that related lawsuits crop up in multiple jurisdictions. Howard M. Erichson, *Interjurisdictional Preclusion*, 96 Mich. L. Rev. 945 (1998).

c. The Decisions Below Improperly Abdicate Federal Authority Over The Issue Preclusion Decision In Diversity Cases Involving Foreign Decisions – An Abdication Not Required Under *Erie v. Tompkins*

Under the Second Circuit's decision below the federal courts would lose the authority to determine what legal rules or principles should apply in diversity cases to determine whether to grant collateral estoppel based on a foreign country judgment. Instead, the issue preclusion rules and policies of the forum state would automatically and invariably govern. While this Court certainly has the power to relinquish federal authority over the issue preclusion decision in diversity suits, *Erie v. Tompkins* does not compel that result. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

The Third Circuit has held that *Erie* does not automatically or invariably require application of forum state rules to determine the preclusive effect of a prior decision. *Paramount Aviation Corp. v. Agusta*, 178 F.3d 132 (3d Cir. 1999). According to the Third Circuit, *Erie* requires a balancing of the competing interests of the federal forum and the forum state, using the balancing test drawn from *Byrd v. Blue Ridge Rural Elec. Co-op., Inc.*, 356 U.S. 525, 535-40 (1958). Thus, in *Paramount* the Third Circuit held that federal issue preclusion rules should apply under *Erie*, not the forum state rules of either the rendering federal diversity court or the forum diversity court.[8] Where a

8. The Third Circuit summarized its *Erie* analysis as follows: "New Jersey has no significant interest in controlling the dockets of other court systems. Moreover, application of a federal rule in the rather unusual circumstances here would be unlikely to create unfairness by causing different results in federal court than in state court or to cause significant forum-shopping." *Paramount Aviation Corp. v. Agusta*, 178 F.3d 132, 144 (3d Cir. 1999). (Cont'd)

federal court is determining the preclusive effect of a *foreign country* decision, the forum state courts have no interest whatsoever in how the federal court determines the preclusive effect of that *foreign country* judgment. Thus, the holding in *Paramount* would evidently require application of federal issue preclusion rules here, just as it did in that case.

Beyond the mere existence of this conflict, there are compelling practical reasons for the Court to reject the Second Circuit's approach – and to do so at the earliest possible time. Very simply, the effects of applying forum state rules in this area are hopelessly uncertain. As a result, the process of attempting to apply uncertain forum state law will be inherently burdensome and wasteful of judicial resources. Facing similar issues Chief Justice Burger opined in *Marrese* that it is better for federal courts simply to apply federal common law rules to determine a judgment's issue preclusive effect.

> If state law is simply indeterminate, the concerns of comity and federalism . . . do not come into play. At the same time, the federal courts have direct interests in ensuring that their resources are used efficiently . . . Given the insubstantiality of the state interests and the weight of the federal interests, a strong argument could be made that a federal rule

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(Cont'd)

Semtek later clarified (1) that the full-faith and credit-statute would not require any different result, and (2) that federal common law would generally require the prior federal diversity judgment to be treated as if it had been rendered by a New Jersey state court, except where competing federal interests required a different result. This is essentially what the Third Circuit did in *Paramount. Semtek* thus reaffirmed the appropriateness of a federal/state balancing test like that applied in *Paramount.*

would be more appropriate than a creative interpretation of ambiguous state law. 470 U.S. 373, 390-391.

II. Certiorari Should Be Granted To Eliminate Serious Practical Burdens On The Federal Courts That Will Otherwise Result From The Second Circuit's Decision

a. The Practical Problem Of Uncertain State and Foreign Law

In *Marrese v. American Academy of Orthopaedic Surgeons* 470 U.S. 373, 390-91 (1985), Chief Justice Burger addressed what federal courts should do when they are required to apply state preclusion law but state law is silent or indeterminate. That opinion is highly relevant to the comparable problem presented here under *Erie*:

> If state law is simply indeterminate, the concerns of comity and federalism . . . do not come into play. At the same time, the federal courts have direct interests in ensuring that their resources are used efficiently . . . Given the insubstantiality of the state interests and the weight of the federal interests, a strong argument could be made that a federal rule would be more appropriate than a creative interpretation of ambiguous state law.
>
> When state law is indeterminate or ambiguous, a clear federal rule would promote substantive interests as well: "Uncertainty intrinsically works to defeat the opportunities for repose and reliance sought by the rules of preclusion, and confounds the desire for efficiency by inviting repetitious litigation to test the preclusive effects of the first effort." [citation omitted] 470 U.S. 373, 390-391

Chief Justice Burger's concerns and recommendations have been shared by commentators. Gene R. Shreve, *Preclusion and Federal Choice of Law* 64 Tex. L. Rev. 1209, 1210. Howard M. Erichson, *Interjurisdictional Preclusion*, 96 Mich. L. Rev. 945, 1263-65 (1998).

The uncertainty problem here is actually worse, and exponentially so, than the uncertainties of substantive state law that troubled Chief Justice Burger in *Marrese.* There, only the uncertain preclusion law of a single state had to be ascertained. Here the preclusion laws of two separate jurisdictions must be ascertained, interpreted, and compared – those of the forum state and the rendering foreign jurisdiction. In addition, special problems arise in comparing the preclusion rules of foreign and domestic legal systems.

The first step under the Second Circuit's approach is to determine whether forum state law would apply its own preclusion rules or the preclusion rules of the foreign rendering jurisdiction. In most states the law on this fundamental point is unsettled. State decisions granting preclusive effect to foreign judgments are commonplace. But they generally do not discuss the choice-of-law issue. The forum state here, New York, provides a good illustration of that pattern, and the resulting unsettled state of the law, even in a state that sees a significant amount of litigation involving foreign incidents and transactions.[9]

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9. New York state courts have routinely accorded collateral estoppel effect to foreign judgments, but have never addressed whose law determines the issue preclusive effect of a foreign country decision. The decision in *Alfadda v. Fenn, supra,* explained that Federal courts in New York "have generally applied New York's law of issue preclusion to determine the preclusive effect of foreign country judgments on state law

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claims. *See, e.g., Alesayi Beverage*, 947 F. Supp. 658 at 666; *Scheiner*, 832 F. Supp. 687 at 694; *Fairchild, Arabatzis & Smith*, 470 F. Supp. 610 at 616-17. In each of these cases, however, the [deciding] court explained that the New York courts which had given preclusive effect to foreign country judgments had generally not specified the source of the applicable law." *Alfadda v. Fenn, supra*, at 1326. Actually, a close analysis of the *Fairchild* case cited by *Alfadda* reveals that the court actually applied New York preclusion law to a point on which rendering jurisdiction law and New York law were clearly in conflict – the same mutuality requirement involved here. While mutuality would have been required in Britain the court applied estoppel anyway because of its conclusion that mutuality was a "dead letter" in New York. As *Alfadda* and other decisions indicate, the best that could be said for Respondents' view was that New York law was indeterminate. Accordingly Petitioners argued that this warranted application of federal common law under Justice Burger's suggested approach from *Marrese*. Of course, Petitioners also strongly asserted that they had the better argument as to what New York courts would likely do. *See Hinchey v. Sellers*, 7 N.Y.2d 287, 197 N.Y.S.2d 129, 165 N.E.2d 156 (N.Y. 1959) (New York Court of Appeals decision applying "greater preclusion" to a sister state decision); *von Mehren and Trautman, Recognition of Foreign Adjudications: A Survey and a Suggested Approach*, 81 Harv. L. Rev. 1601, 1686 (1968) (concluding that the *Hinchey* approach would likely be followed for foreign country cases, where no full-faith-and-credit issues arose). Also see, *Loretta M. Hart v. American Airlines, Inc.*, 61 Misc. 2d 41, 304 N.Y.S.2d 810 (N.Y. 1969). The Second Circuit relied on the lower court's citation of New York decisions denying a litigant the ability to use a defense of claim preclusion

(Cont'd)

A law review article surveying a number of other states describes the cases as "in complete conflict" and concludes with the hope that "the *Restatement* would make it reasonably clear whether American courts should look to the rendering nation's law, their own law, some special law, or to some combination of the above to determine what preclusive effect should be attributed to a foreign country judgment . . ." Robert C. Casad, *Issue Preclusion and Foreign Country Judgments: Whose Law?*, 70 Iowa L. Rev. 53, 75 (1984). Unfortunately the Restatements do not provide any clarification. The Restatement of Conflicts explains that many of the issues are "unsettled." Restatement, 2d, Conflict of Laws, § 98, comment g. And the Restatement of Foreign Relations is completely equivocal.[10] Restatement, 3d,

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(Cont'd)
based on a foreign decision that was still subject to modification or collateral attack where rendered. The same rule applies in New York when claim preclusion is asserted based on a non-final decision of a sister state, such as a child support decree still subject to modification. Petitioners argued that this rule has no application in cases like this – domestic or foreign — where the underlying decision is concededly conclusive and final between the parties thereto.

Whatever the New York courts may ultimately hold, it is certainly fair to characterize the current state of the law as "unsettled."

10. The Restatement of Foreign Relations explains that "a judgment of a foreign country ordinarily has no greater effect in the United States than in the country where the judgment was rendered." But the Restatement goes on to explain that "no rule prevents a court in the United States from giving greater preclusive effect to a judgment of a foreign state than would be

(Cont'd)

Foreign Relations Law of the U.S., § 481. Finally, any state decisions addressing the preclusive effect of sister-state judgments are generally of no help in this area. Any decisions deferring to the preclusion rules of a sister state would merely be complying with the requirements of the full-faith-and-credit clause, which does not apply to foreign country judgments. Such *constitutional law* decisions would provide no guidance on the *choice-of-law* policies a state might apply to foreign judgments where the constitution does not dictate a result.

Given these manifest uncertainties of state law, the arguments for applying federal common law rules are compelling, even more compelling than in *Marrese*. Chief Justice Burger's opinion in *Marrese* concluded that a state's interest in applying its own indeterminate preclusion rules *to its own decisions* was "insubstantial". In comparison, a state's interest in having a federal court apply indeterminate state law – to decide whether to grant collateral estoppel effect to a *foreign*

(Cont'd)
given in the courts of that [foreign] state." It then gives an example of a mass-tort where the Restatement evidently approves of the forum court's ability to give greater issue preclusive effect than would be accorded by the rendering jurisdiction, because of the rendering jurisdiction's technical insistence on "mutuality" and the forum's abandonment of that requirement. The example is on "all-fours" with this case.

> For instance, if an action growing out of an airline disaster is brought in foreign state *A*, and in that action the airline has been determined to have been negligent, a plaintiff in an action in the United States might be able to rely on that determination, even if the law of state *A* would require full identity of parties before giving preclusive effect to the determination in the first action. Restatement, 3d, Foreign Relations Law of the U.S. § 481.

country decision – is less than "insubstantial" – the state quite literally has *no interest* in that question. Because no *state decision* is involved, any question of how the federal court manages its own docket is a matter of complete indifference to a state court.

The second step under the Second Circuit's analysis – if it is determined that a forum state's choice-of-law rules refer to foreign country preclusion law – is to determine and apply that foreign law. Suffice it to say that the process of ascertaining foreign law, typically with experts provided by both sides, is substantially more cumbersome than merely deciding an issue of domestic law. *See generally* FRCP 44.1.

The third and arguably most problematic step is to determine whether there is a true conflict between state preclusion law and foreign preclusion law. As explained below, this is arguably the most difficult, time-consuming, and ultimately *futile* aspect of the entire procedure required by the Second Circuit's decision.

b. "Form vs. Substance" In Comparing Foreign and Domestic Preclusion Concepts – A Problem Illustrated By The Preclusion Law of Canada

Under the Second Circuit's view, any federal court concluding that forum state law refers to foreign law must determine whether the preclusion laws of the foreign jurisdiction and those of the forum state conflict. This task is complicated by the fact that foreign countries in both common-law and civil-law jurisdictions often have other doctrines or procedures that can produce an effect comparable to issue preclusion. The federal court must thus decide whether it should look to the "form" or "substance" of foreign preclusion law. Canada, one of our most significant trading partners, provides a vivid example of the resulting problem.

Canada, like virtually all common-law jurisdictions outside the United States, continues to require mutuality of estoppel. That requirement bars estoppel for the benefit of plaintiffs who are victims of a mass-tort or other violation and who are seeking to rely on prior Canadian determinations, in cases brought by other victims, addressing the identical tort and the identical defendant. Because of the problems caused by the "mutuality" requirement, the Canadian courts commonly employ other doctrines to achieve similar purposes. The Supreme Court of Canada has explained:

> Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. (See for example, Franco v. White (2001), 53 O.R. (3d) 391 (C.A.), Bomac Construction Ltd. v. Stevenson , [1986] 5 W.W.R. 21 (Sask. C.A.), and Bjarnarson v. Government of Manitoba (1987), 38 D.L.R. (4th) 32 (Man. Q.B.), aff'd (1987), 21 C.P.C. (2d) 302 (Man. C.A.)). This has resulted in some criticism, on the ground that the doctrine of abuse of process by relitigation is in effect non-mutual [*34] issue estoppel by another name. . ." *Toronto (City) v. C.U.P.E., Local 79*, 2003 W.C.B.J. LEXIS 1963, 33-34 (W.C.B.J., 2003)

Thus, in determining the preclusive effect of a Canadian judgment, a federal court following the Second Circuit's approach must decide how literally and formalistically forum state and foreign preclusion rules must match. Is it sufficient if

the foreign rendering jurisdiction produces an effect *comparable to collateral estoppel* using another mechanism, such as the Canadian doctrine of "abuse of process"? Or must the foreign rendering jurisdiction apply the same rules of collateral estoppel *in haec verba*. The Supreme Court of Canada has acknowledged the criticism that its "abuse of process" doctrine is little more than " estoppel by another name". Yet the Supreme Court of Canada continues to maintain that the two doctrines are distinct. Does that mean that non-mutual estoppel does not exist in Canada and thus cannot be applied in the United States? Or does the existence of a similar effect under Canadian law suffice to allow collateral estoppel under U.S. law?

This "form and substance" issue is not just theoretical. The instant case illustrates how it arises in practice. In this case Petitioners' expert testified that Egypt's system of precedent – not unlike Canada's doctrine of "abuse of process" – actually provided a *more robust* preclusion rule than mere issue preclusion. Under Egyptian law, the expert testified, Respondents' ultimate *legal liability* could not be determined differently by the Egyptian courts. (Appellants' Appendix at 212.) That is actually a far stronger rule of "consistency" than applies in New York or federal courts, but it probably cannot technically be called issue preclusion. In response, the district court below evidently concluded it was required to focus on whether Egyptian courts applied issue preclusion or collateral estoppel *in haec verba* – not whether a doctrine that was substantively equivalent (or even stronger) applied to bind Respondents and ensure consistency of results. Thus, the court rejected the testimony of Petitioners' expert as "interesting" but irrelevant because it did "not squarely answer the question presented." (App. 20a.).

Obviously some other courts might reach different conclusions on this or other particular "form and substance"

issues. For example, in *Alfadda v. Fenn*, *supra*, at 1329, the court opined that, "regardless of the mechanisms utilized by a foreign court to achieve its objectives, a United States court should not be confined to using the foreign court's mechanisms or else forgo achieving its own objectives." But that variability of outcomes is the problem posed for the federal courts by the Second Circuit's approach. The "form and substance" question must be relitigated anew (1) for every different forum state arguably referring to foreign preclusion law, (2) for every different foreign country, and (3) for every different technical aspect of preclusion law where a conflict arguably exists (e.g., privity, mutuality, etc.). The possible permutations may not be endless[11], but it is fair to say there will not likely ever be any certainty or predictability under the Second Circuit's approach.

In short, while the Second Circuit adopts an "automatic" and "mechanical" rule deferring to forum state law, there is nothing "automatic" or "mechanical" about the process that follows thereafter. There will be no predictability to the choice-of-preclusion-law issue and each case will burden the federal courts anew. Such an approach makes no sense for an issue of judicial self-regulation like collateral estoppel. Professor Erichson's arguments for applying federal preclusion law when similar problems exist in the domestic context are equally applicable to the international issue presented here:

> Although the law currently is unsettled, the Supreme Court should make clear that federal courts

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11. On the mutuality issue alone, if there were 30 states that arguably referred to foreign preclusion law and 25 major foreign jurisdictions that insisted on mutuality but also employed other mechanisms to ensure consistency of outcomes, there could be 750 unique determinations of whether a true conflict of laws existed between foreign law and forum state preclusion law.

> are not confined to . . . [rendering jurisdiction] preclusion law . . . (1) when . . . [that] preclusion law is so undeveloped or confused that it does not suggest an answer to the preclusion problem . . . or (2) when the federal court can advance the objectives of its intramural rule of greater preclusion without interfering with any policies that underlie the . . . [rendering jurisdiction's] rule of lesser preclusion. . . . federal courts [should be] free to augment the preclusive effects of a [non-federal] . . . judgment whenever doing so would not frustrate the purpose behind the [rendering court's] . . . rule of lesser preclusion and would advance the purpose behind the federal rule of greater preclusion. This approach brings to the choice-of-preclusion-law question a form of interest analysis more commonly associated with traditional choice of law. Erichson, *Interjurisdictional Preclusion*, *supra*, at 1263-1265.

c. The *Byrd* Balancing Test Justifies Application Of Federal Preclusion Rules

Given the practical problems of applying uncertain state and foreign law, the *Byrd* balancing test justifies application of a uniform federal rule applying federal common law issue preclusion rules to determine the issue preclusive effect of a foreign country decision. The *Byrd* balancing test considers three legitimate interests: (1) the federal court's interests in adhering to significant federal principles in the administration of justice, (2) the state's interest in having federal courts recognize and uphold its substantive rules and policies, and (3) the litigants' interests in having uniform outcomes regardless of where the plaintiff sues. Each of these considerations warrant applying federal rules under *Erie*.

First, the federal court has a compelling interest in retaining the greatest possible discretion to apply issue preclusion, as a matter of judicial economy and to avoid the real or perceived injustice of unexplainably inconsistent results.

Second, where a foreign country decision is involved, the forum state literally has *no interest* in how a federal court determines the decision's issue preclusive effect.

The third issue of "uniform outcomes" is more complex but also militates in favor of federal preclusion rules rather than forum state rules.

In alienage cases like this, of course, there is no possible concern with discrimination against citizens who are unable to establish diversity. Even in cases based on diversity of state citizenship, where some parties might be unable to establish diversity, the purpose of collateral estoppel is to promote as much uniformity with prior determinations as possible, even if perfect uniformity is not possible due to the vagaries of federal jurisdictional rules.

It is true that a potentially more favorable federal issue preclusion rule could theoretically attract certain suits from state courts – potentially increasing the size of the federal docket. But many suits arising out of foreign incidents would likely be brought in federal courts anyway, due to other procedural advantages offered by federal courts for foreign-based litigation. Here, for example, Petitioners filed in federal court more than a year before the related Egyptian litigation had even commenced. Clearly collateral estoppel was the farthest thing from Petitioners' minds. Petitioners preferred federal court over state court because of their concern that the case might not be able to be maintained at all in state court under state *forum non*

conveniens rules.[12] In contrast, in diversity cases federal courts apply federal rules to the issue of *forum non conveniens* because of the importance of that issue to the management of the federal court. *In re Air Crash Disaster near New Orleans*, 821 F.2d 1147 (5th Cir. 1987).

If one is focusing on the issue of docket control, it certainly makes no sense to *open* the federal courts to diversity cases that might be dismissed in state courts, and then compel the federal courts to apply state rules preventing the use of collateral estoppel to streamline or expedite the litigation. *See In re Air Crash Disaster near New Orleans*, 821 F.2d 1147 (5th Cir. 1987) (*en banc* decision holding that federal *forum non conveniens* rules apply to diversity cases). It also makes no sense to insist on a federal court's ability to manage its caseload by taking the extreme step of dismissing a case that could not be dismissed under state *forum non conveniens* rules, but not to permit the federal court to hear the case and manage its caseload by using federal rules of collateral estoppel. The Fifth Circuit's discussion of the *Erie* issues in the above cited case – also involving a mass-tort with victims from multiple jurisdictions – is highly instructive for the *Erie* issue presented here. The Fifth Circuit explained:

> . . . we would be hardpressed to hold that *forum non conveniens* is "procedural" because, as a practical matter, only an outright dismissal with prejudice could be more "outcome determinative" than a conditional dismissal to a distant forum in a foreign

12. In particular, New Jersey and Maryland state courts might not find sufficient contacts with the Respondents and New York state courts might dismiss under state *forum non conveniens* rules since none of the Plaintiffs were New York residents. Federal courts could not dismiss under the federal *forum non conveniens* rules that applied in diversity cases.

land. . . . [Nevertheless] our task is to evaluate whether applying federal forum non conveniens in this case advances or hinders the "twin aims" of *Erie*. . . . [avoiding] the unfairness of giving one set of plaintiffs (those who can sue in federal court) some particular advantage unavailable to non-diverse plaintiffs who must proceed in state court . . . [while still promoting] . . . the federal courts' own interests in equitable self-administration . . . The enormous difference between the outcomes of state and federal proceedings points forcefully toward applying state law under the first aim of *Erie*. On the other hand, the interests of the federal courts in maintaining the federal doctrine even in a diversity case are powerful . . . Federal forum interests in self-management point forcefully toward applying federal law under the second aim of *Erie* . . . We have seen this kind of problem before. We have held that the sufficiency of the evidence is a federal question in a diversity court precisely because the federal forum's interest in self-management overrides uniformity concerns . . . federal courts have inherent powers under Article III to displace state laws on matters involving their basic competence as courts . . . We must choose between maintaining important internal administrative and equitable powers of our courts at the cost of disuniformity of result between state and federal diversity courts, or uniformity at the cost of giving up part of our self-regulatory powers. . . . We hold that the interests of the federal forum in self-regulation, in administrative independence, and in self-management are more

> important than the disruption of uniformity created by applying federal *forum non conveniens* in diversity cases. *In re Air Crash Disaster near New Orleans*, 821 F.2d 1147, 1156-1159 (5th Cir. 1987).

A grant of certiorari in this case would certainly allow for a full elaboration of these *Byrd* issues. One thing cannot be disputed: it makes no sense for the Second Circuit to unilaterally abdicate the federal courts' right to even evaluate these concerns, particularly when the effect is to burden the federal courts as has been described.

d. The Issues Presented Here Can Be Addressed Broadly For All Diversity Cases or More Narrowly For Cases Arising Under Foreign Law and/or Involving Alienage

In theory, the burdens caused by the Second Circuit's approach will affect all diversity cases where collateral estoppel is sought based on a foreign country decision. However, the problem could also be analyzed and dealt with in smaller and perhaps more manageable bites.

Many cases, like this case, will involve foreign causes of action and foreign defendants. The Court could certainly choose to address the issues presented here only for diversity cases that involve one or both of those special factors. The treatment of other diversity cases could be left for another day. There are several reasons why such an approach could appear preferable to the Court.

First of all, as a strictly technical matter *Erie v. Tompkins* and the Rules of Decision Act may not apply in the first place to cases like this arising under foreign country law. The Rules of Decision Act applies, on its face, only to cases to which state

rules of decision apply.[13] State rules of decision clearly would not apply to determine whether an act or omission of a foreign hotelier in a foreign country was negligent or reasonable. *See Slater v. Mexican National Railroad Company*, 194 U.S. 120 (1904), *Cuba Railroad Company v. Crosby*. 222 U.S. 473 (1912).[14] If this analysis is correct, the preclusion issue would

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13. This point is explained in Wright and Miller, Federal Practice & Procedure, Sections 4501 and 4520 (emphases supplied):

> . . . the core of the Erie doctrine is that the substantive law to be applied by the federal courts in any case is state law, except when the matter before the court is governed by the United States Constitution, an Act of Congress, a treaty, international law, *the domestic law of another country*, or, in special circumstances, by federal common law. . .
>
> . . . it is the source of the right sued upon, and not the ground on which federal jurisdiction over the case is founded, which determines the governing law. * * * Thus, *the Erie doctrine applies, whatever the ground for federal jurisdiction, to any issue or claim which has its source in state law.* * * *

14. The district court applied forum state law to issues on which it determined that Egyptian and forum state law did not conflict, including the standards of negligence. It is not disputed that the cause of action arose only under Egyptian negligence law and would have been dismissed if it could not have been maintained under the negligence standards of the jurisdiction where the allegedly negligent conducted occurred. *Slater v. Mexican National Railroad Company*, 194 U.S. 120 (1904), *Cuba Railroad Company v. Crosby*. 222 U.S. 473 (1912).

be entirely one of federal common law for cases like this arising under foreign country law.

At the same time, Petitioners recognize that the Court could adopt a federal common law rule of administrative convenience – like that adopted in *Semtek* – for cases arising under foreign law that are not technically subject to *Erie*. Such a rule might require a federal court to apply the principles and policies of *Erie*, except where competing federal interests were involved. Under such an approach, the problem of choice-of-preclusion-law for foreign decisions, in cases arising under foreign law, would present an overriding federal interest justifying a federal rule.

The interest of the federal court in controlling the issue preclusion decision in federal court is well established. In addition, in any case like this arising under foreign law there is no rational argument for the *forum state's* judicial policies to be considered at all in deciding whether a federal court should apply preclusion to a *foreign country* judgment. Finally, in any case where federal diversity jurisdiction is based on *alienage*, any concern with inconsistent treatment of citizens of different states does not exist.

In sum, certiorari would be appropriate and helpful to address the issue for all diversity cases. But it would also be extremely helpful – and perhaps solve the lion's share of the problem the Second Circuit's approach would otherwise impose on the federal courts – if the Court required application of federal common law preclusion rules (1) for diversity cases to which *Erie* does not technically apply (because they do not arise under *state* law in the first place), (2) to cases involving diversity of national citizenship or alienage, or (3) to cases presenting some combination of those two factors.

CONCLUSION

For the aforementioned reasons, Petitioners respectfully request that this Petition be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED JANUARY 4, 2005

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 03-7668(L),
03-7684 (CON),
03-7686 (CON),
03-7688 (CON)

PRESENT:

Hon. John M. Walker, Jr.,
Chief Judge,
Hon. Roger J. Miner,
Hon. Jose A. Cabranes,
Circuit Judges

KAREN GUIDI, Individually and as Executrix of the Estate of Robert L. Guidi, EVE HOFFMAN, Individually and as Executrix of the Estate of Coby M. Hoffman, MERRILL KRAMER, LOIS KRAMER,

Plaintiffs-Appellants,

- v. -

INTER-CONTINENTAL HOTELS CORPORATION, a Delaware Corporation, INTER-CONTINENTAL HOTELS CORPORATION, a corporation of the United Kingdom, INTER-CONTINENTAL HOTELS & RESORT CORPORATION, SEMIRAMIS HOTEL CORP., SAISON HOLDINGS, B.V., SAISON CORPORATION,

Defendants-Appellees.

Appendix A

SUMMARY ORDER

Appeal from the United States District Court for the Southern District of New York (Loretta A. Preska, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED that the judgment of the district court is **AFFIRMED**.

Plaintiff-appellants (collectively, "Guidi") appeal the May 27, 2003, judgment of the United States District Court for the Southern District of New York (Loretta A. Preska, *Judge*) dismissing their complaint after a jury trial that concluded with a jury verdict in favor of the defendants-appellees.

Guidi argues that the district court erred by refusing to give collateral-estoppel effect to a decision rendered in related litigation by an Egyptian court. Having reviewed this argument de novo, we find no error in the district court's refusal to grant Guidi partial summary judgment based on the Egyptian court's decision.

Guidi also claims that the district court committed various errors related to its handling of issues of foreign law – errors in admitting evidence, in allegedly failing to follow Fed. R. Civ. P. 44.1, and in instructing the jury. In light of the totality of the proceedings below, we find that any error by the district court was harmless. We therefore need not decide whether these claims were properly preserved below.

Appendix A

We have considered carefully all of Guidi's arguments and find them to be without merit. For the foregoing reasons, the judgment of the district court is hereby **AFFIRMED**.

FOR THE COURT:

Roseann B. MacKechnie, Clerk

By: s/ Lucille Carr,
Lucille Carr, Deputy Clerk

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK FILED MAY 27, 2003

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

95 CIVIL 9006 (LAP)

KAREN GUIDI,

Plaintiff,

-against-

INTER-CONTINENTAL HOTEL,

Defendant.

JUDGMENT

The issues in the above-entitled action having been brought on for trial before the Honorable Loretta A. Preska, United States District Judge, and a jury on May 13, 2003, and at the conclusion of the trial the jury having returned a verdict in favor of the defendant, it is,

ORDERED, ADJUDGED AND DECREED: That the Complaint be and it is hereby dismissed.

Appendix B

DATED: New York, New York
May 23, 2003

SO ORDERED

s/ Loretta A. Preska
USDJ

J. MICHAEL McMAHON
Clerk of Court

By: s/ [illegible]
Deputy Clerk

APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK FILED AUGUST 12, 2002

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

95 Civ. 9006 (LAP)

KAREN GUIDI, Individually and as Executrix of the Estate of Robert L. Guidi, EVE HOFFMAN, Individually and as Executrix of the Estate of Coby M. Hoffman, MERRILL KRAMER and LOIS KRAMER,

Plaintiffs,

-v.-

INTER-CONTINENTAL HOTELS CORPORATION, a Delaware Corporation, INTER-CONTINENTAL HOTELS CORPORATION, a Corporation of the United Kingdom, INTER-CONTINENTAL HOTELS AND RESORTS CORPORATION, SEMIRAMIS HOTEL CORP., SAISON HOLDINGS, B.V., SAISON CORPORATION,

Defendants.

August 12, 2002, Decided
August 12, 2002, Filed

Appendix C

OPINION:

MEMORANDUM AND ORDER

LORETTA A. PRESKA, United States District Judge:

Plaintiffs Karen Guidi, Eve Hoffman, Merrill Kramer ("Kramer") and Lois Kramer bring this action against six defendants, alleging damages arising from tragic events that took place in the Semiramis Hotel in Cairo, Egypt (the "Hotel"). On October 26, 1993, Robert L. Guidi ("Guidi"), Coby M. Hoffman ("Hoffman") and Kramer, as guests in the Hotel, were sitting in the hotel restaurant when a gunman, later identified as Sabir Farahat, opened fire, killing Guidi and Hoffman and seriously injuring Kramer. The additional victims of the attack were a French and an Italian hotel guest, who were killed, and a Syrian and two Egyptians, who were injured.

On October 20, 1995, plaintiffs brought suit in this court, alleging that the deaths of Guidi and Hoffman and the injuries of the plaintiffs resulted from defendants' negligent security measures. Of the six defendants named in the complaint, only Inter-Continental Hotels ("IHC"), which managed the Hotel at the time of the incident, has been served.

IHC moved to dismiss based on the doctrine of forum non conveniens. On July 17, 1997, I issued a Memorandum and Order granting IHC's motion to dismiss, subject to IHC's agreement not to contest suit in Egypt. *Guidi v. Inter-Continental Hotels Corp.*, 1997 U.S. Dist. LEXIS 10444, No. 95 Civ. 9006 (LAP), 1997 WL 411469 (S.D.N.Y. July

18, 1997). On April 20, 1999, I denied plaintiffs' motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure for relief from the July 17 Memorandum and Order. *Guidi v. Inter-Continental Hotels Corp.*, 1999 U.S. Dist. LEXIS 5435, No. 95 Civ. 9006 (LAP), 1999 WL 228360 (S.D.N.Y. Apr. 20, 1999). On February 14, 2000, the Court of Appeals reversed dismissal and returned the case to the Southern District of New York. *Guidi v. Inter-Continental Hotels Corp.*, 203 F.3d 180 (2d Cir. 2000). On August 16, 2000, the Court of Appeals amended its original decision but reached the same conclusion with respect to reversal. *Guidi v. Inter-Continental Hotels Corp.*, 224 F.3d 142 (2d Cir. 2000).

Meanwhile, the families of the other hotel guests who died in the shooting, Mr. Fernand Boulan ("Boulan"), a French national, and Mr. Luigi Daga ("Daga"), an Italian national, filed suit in Egypt on December 3, 1996, against the manager of the Hotel, the chairman of the Board of Directors of the Hotel and the chairman of the Board of Directors of Delta Insurance Company. The separate actions brought by the estates for the Italian and French victims were joined for all purposes in the Egyptian courts. (Pls.' Rule 56.1 Statement P 9; Def.'s Reply to Pls.' Rule 56.1 Statement P 9).

On January 28, 1999, the South Cairo Court of First Instance ("Cairo Trial Court") rendered a judgment in favor of plaintiffs. (Affidavit of Paul A. Marber ("Marber Aff."), Ex. 34; Pls.' Rule 56.1 Statement P 11; Def.'s Reply to Pls.' Rule 56.1 Statement P 11). The Cairo Trial Court found the Hotel to be "strictly liable for the harm incurred by the plaintiffs." (Affidavit of Robert B. Wallace, sworn to on

February 28, 2002, P 18). In so holding, the Cairo Trial Court observed:

> There exists a contract between the hotel and its guests which requires and obligates the hotel to exert care for its guests and to safeguard its clients. . . . Hence, and of the utmost importance, was the necessity of controlling entrans [sic] into the Hotel, and every person so entering should consent to search without objection in order to assure the safety of the guests, particularly as Egypt was subject, at that time, to terrorist activities, thus entailing the necessity of taking precautionary measures and exercising the utmost vigilance. . . . The Hotel should have introduced and utilized equipment or any appropriate means of detecting arms carried by any person entering into the Hotel.

(Marber Aff., Ex. 34). On appeal, the Cairo Court of Appeal Circuit No. 31 ("Cairo Appellate Court") affirmed the judgment of the Cairo Trial Court. (*Id.*, Ex. 36). As part of its ruling, the Cairo Appellate Court observed:

> If a traveller agrees to lodge in a hotel, the contract is not restricted to obliging the owner of the Hotel to provide a place for the guest to lodge. But the owner is also committed to offer everything that is related to the nature of this lodging. This includes, as is common practice, being cautious and exerting all efforts and diligence to protect the guest against anything that may endanger his

> safety or security or comfort. Thus the owner of a hotel is committed to protect his guests just as he is committed to offer them lodging. That is [,] a hotel is committed to exert all diligence in taking the common precautions to ensure the safety of the residents. . . . The Hotel has breached the above mentioned obligations and did not take sufficient ways, means and measures, nor did it employ sufficient staff or use sufficient equipment to control those who frequent the Hotel and who are not residents, and to monitor the weapons and ammunition that they may carry, a matter which enabled a person to enter the Hotel before the security staff, walk freely in the halls of the Hotel until he reaches the place where the people he had chosen to be his victims were sitting and shoot at them with his gun.

(*Id.* at 8).[1]

Based on the decisions of the Cairo Trial Court and the Cairo Appellate Court (collectively, the "Egyptian Judgments"), plaintiffs now move for partial summary judgment in the instant action on the grounds that IHC is collaterally estopped from relitigating the issue of IHC's liability with respect to the plaintiffs. Specifically, plaintiffs assert that: (1) the issues in this action are "substantially identical to those that were resolved against the Hotel and

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1. Plaintiffs include both the original Arabic version and the English translation of the decisions of the Cairo Trial Court and the Cairo Appellate Court as exhibits to the Marber affidavit.

its manager in the Egyptian action," (Pls.' Mem. Summ. J. at 12); (2) the defendants in the Egyptian lawsuit had a full and fair opportunity to present their defense, (*id.* at 17); and (3) IHC "must be deemed to be in privity with the IHC-employed manager who has already been found liable in his capacity as an IHC manager," (*id.* at 14).

DISCUSSION

I. Summary Judgment Standard

Under Rule 56, summary judgment shall be rendered if the pleadings, depositions, answers, interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *See* Fed. R. Civ. Proc. 56(c); *Anderson v. Liberty Lobby*, 477 U.S. 242, 250, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). An issue of fact is genuine when "a reasonable jury could return a verdict for the nonmoving party," and facts are material to the outcome of the litigation if application of the relevant substantive law requires their determination. *Anderson*, 477 U.S. at 248.

The moving party has the initial burden of "informing the district court of the basis for its motion" and identifying the matter that "it believes demonstrate[s] the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

The substantive law determines the facts which are material to the outcome of a particular litigation. *Anderson*, 477 U.S. at 250; *Heyman v. Commerce & Indus. Ins. Co.*,

524 F.2d 1317, 1320 (2d Cir. 1975). In determining whether summary judgment is appropriate, a court must resolve all ambiguities, and draw all reasonable inferences against the moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986) (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 8 L. Ed. 2d 176, 82 S. Ct. 993 (1962)).

If the moving party meets its burden, the burden then shifts to the non-moving party to come forward with "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. Proc. 56(e). The non-moving party must "do more than simply show there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. Only when it is apparent, however, that no rational finder of fact "could find in favor of the non-moving party because the evidence to support its case is so slight" should summary judgment be granted. *Gallo v. Prudential Residential Servs. Ltd. Partnership*, 22 F.3d 1219, 1223 (2d Cir. 1994).

II. Egyptian Judgments

The parties agree that there is no federal question involved in this case and that subject matter jurisdiction is based upon diversity of citizenship. (Def.'s Mem. Law. Opp. Partial Summ. J. at 4). In a diversity action, a federal court must apply the substantive law of the state in which it sits. *Erie Railway Co. v. Tompkins*, 304 U.S. 64, 78, 82 L. Ed. 1188, 58 S. Ct. 817, 11 Ohio Op. 246 (1938). Therefore, New York law governs the issue of whether the Egyptian Judgments should be recognized, and if so, the extent of the preclusive effect that should be accorded to those judgments.

Appendix C

A. Recognition of the Egyptian Judgments

In *Voreep v. Tarom Romanian Air Transport*, 1999 U.S. Dist. LEXIS 7294, No. 96 Civ. 1384 (LMM), 1999 WL 311811 (S.D.N.Y. May 18, 1999), the court noted the rule in New York with respect to recognizing foreign judgments:

> Recognition of a foreign judgment involves a determination by an American court that the judgment is valid and binding on the parties with respect to the subject matter and issues involved in that action. While courts in this country are under no duty to recognize judgments of other nations, courts of this state give effect to those judgments based on principles of comity. In New York, the law reflects a liberal policy of recognition, one "founded upon the desirability of putting an end to litigation and encouraging the uniform enforcement of private rights wherever derived." Recognition may be denied, however, on the following grounds: the rendering court lacked jurisdiction; the judgment was procured by fraud; or if the judgment violates the public policy of New York.

1999 U.S. Dist. LEXIS 7294, [WL] at *2 (citations omitted).[2] Here, plaintiffs assert, and IHC does not appear to dispute,

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2. Plaintiffs assert that, because none of these exceptions applies, the only remaining questions to be decided are whether "the issues in this action are substantially identical to some of the issues resolved against the hotel in the (Cont'd)

that the Egyptian Judgments were not procured by fraud, do not violate the public policy of New York and were not issued by a court lacking jurisdiction. Therefore, I must now determine what preclusive effect, if any, the Egyptian Judgments have on the instant action.

B. Preclusive Effect of the Egyptian Judgments

1. *New York v. Egyptian* Preclusion Law

New York courts have routinely declined to give more preclusive effect to a foreign judgment than it would be accorded in the courts of the jurisdiction that rendered it. *See, e.g.*, *Weiss v. La Suisse*, 161 F. Supp. 2d 305, 313 n.7 (S.D.N.Y. 2001) ("Generally, New York courts will give a foreign judgment decision no more preclusive effect than it would be accorded by the courts of the jurisdiction which rendered it."); *Voreep*, 1999 U.S. Dist. LEXIS 7294, 1999 WL 311811, at *3 ("Despite some opinions to the contrary, the Court finds that a court in New York would apply the law of the rendering jurisdiction to determine the preclusive effect of a foreign judgment."); *Schoenbrod v. Siegler*, 20

(Cont'd)

Egyptian action" and whether the defendant in the Egyptian action was in privity with IHC. (Pl.'s Mem. Summ. J. at 10-12). Plaintiffs are mistaken. As discussed infra, there is an additional question remaining: the Court must first determine, before deciding whether the issues in the parallel actions are identical and whether there is privity between defendants, whether New York or Egyptian preclusion law applies to those judgments.

N.Y.2d 403, 409, 283 N.Y.S.2d 881, 230 N.E.2d 638 (1967) ("Generally, there is no reason to give more conclusive effect to a foreign judgment than it would be accorded by the courts of the jurisdiction which rendered it."). Therefore, Egyptian preclusion law applies here.

2. Egyptian Preclusion Law

IHC asserts that Egypt does not recognize collateral estoppel and only permits judgments to be used by the parties to the judgment against one another. (Def.'s Mem. Opp. Summ. J. at 14-18). For support, IHC cites extensively to the affidavit of Dr. Aktham El Kholy, an Egyptian attorney and former civil law professor. (IHC Exhibits, Ex. 38, Affidavit of Dr. Aktham Amin El Kholy, sworn to on February 20, 2002 ("El Kholy Aff.")). Dr. El Kholy relies on Article 101 of the Law of Evidence under Egyptian law, which provides, in pertinent part:

> The judgments which acquired the force of a judged matter have an authority as to the rights they have decided upon Evidence contradicting that authority is inadmissible. However, the said judgments have that authority only over disputes which arise among the same parties, without change of their capacities, and which relate to the same right having the same object and the same cause of action. The Court shall apply this authority of its own motion.

(Def.'s Mem. Opp. Summ. J. at 15).

Plaintiffs, in turn, assert that, while IHC now tells the Court that Egyptian law does not recognize collateral estoppel but only allows judgments to be used by both parties to the judgment against each other, IHC previously told the Court that Egyptian law does recognize this doctrine. (Pls. Reply Mem. Summ. J. at 4). Further, plaintiffs submit the affidavit of Mr. Adel El Nabli—the resident partner in the Cairo office of Nabli and Associates, P.C. and a member of the bar of New York—to support plaintiffs' claim that an Egyptian court would, in fact, give collateral estoppel effect to the Egyptian Judgments against IHC. (Affidavit of Adel El Nabli ("El Nabli Aff."), PP 1-2).

a. Interpretation is a Matter of Law

Interpretation of Egyptian law is entirely within the discretion of the Court. As Judge Keenan recently explained in *Rutgerswerke AG & Frendo S.P.A. v. Abex Corp.*, 2002 U.S. Dist. LEXIS 9965, No. 93 Civ. 2914 (JFK), 2002 WL 1203836 (S.D.N.Y. June 4, 2002):

> Federal Rule of Civil Procedure 44.1 controls determinations of foreign law in federal court. Rule 44.1 gives a district court wide latitude in resolving issues of foreign law: "The court in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law." Fed. R. Civ. P. 44.1. Because of this latitude, a court may reject even

> uncontradicted expert testimony and reach its own decisions on the basis of independent examination of foreign legal authorities. *See Curtis v. Beatrice Foods Co.*, 481 F. Supp. 1275, 1285 (S.D.N.Y.), *aff'd*, 633 F.2d 203 (2d Cir. 1980). Moreover, disagreement among legal experts on content, applicability, or interpretation of foreign law, as here, does not create genuine issues of material fact for summary judgment purposes. *See Banco de Credito Indus., S.A. v. Tesoreria General*, 990 F.2d 827, 838 (5th Cir. 1993); *see also Bassis v. Universal Line*, S.A., 436 F.2d 64, 68 (2d Cir. 1970); *Kashfi v. Phibro-Salomon, Inc.*, 628 F. Supp. 727, 737 (S.D.N.Y. 1986).

2002 U.S. Dist. LEXIS 9965, [WL] at *16; *see also, e.g.*, *Argonaut Partnership, L.P. v. Bankers Trustee Co. Ltd.*, 1997 U.S. Dist. LEXIS 1092, No. 96 Civ. 1970 (MBM), 96 Civ. 2222 (MBM), 1997 WL 45521, at *9 (S.D.N.Y. Feb. 4, 1997):

> The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination should be treated as a ruling on a question of law. . . . A court may reject the opinion of an expert on foreign law or give it whatever probative value the court believes it deserves. *See United States v. First Nat'l Bank of Chicago*, 699 F.2d 341, 344 (7th Cir. 1983); *Pfizer Inc. v. Elan Pharm. Research Corp.*, 812 F. Supp. 1352, 1361 (D. Del. 1993). Further, a court may

> reexamine proffered statutory provisions to determine whether counsel's interpretation is accurate or plausible. *See Kashfi v. Phibro-Salomon, Inc.*, 628 F. Supp. 727, 737 (S.D.N.Y. 1986) ("It is clearly within the authority of the court to interpret and apply a foreign statute.").

b. Egyptian Courts Do Not Honor Collateral Estoppel

After consideration of the parties' respective briefs and affidavits, I find that an Egyptian court would not give collateral estoppel effect to the Egyptian Judgments against IHC on the issue of liability. In support of IHC's assertion that Egyptian courts do not recognize the doctrine of collateral estoppel, Dr. El Kholy's affidavit cites extensively to the Egyptian laws of evidence. But the affidavit of plaintiffs' purported Egyptian law expert, Mr. El Nabli, contains very few citations and offers nothing more than a theoretical discussion of how he believes an Egyptian court might, from a practical point of view, view the preclusive effect of the Egyptian Judgments. For example, Mr. El Nabli asserts:

> The idea whereby a civil law judge's role is to find in the civil code the specific provision applicable to a particular set of facts stems from the caricature picture and ancient dogma of the absolute completeness of the civil code. Historically, the completeness and the coverage of every single possibility, however remote, that can occur in real life, was indeed an ideal

influenced by ideas of enlightenment and reason, or because of searching for national unity or from theories of positivism and conceptualism.

. . .

Dr. El Kholy's Affidavit focuses on article 101 of the Law of Evidence. . . . Significantly, this old and traditional justification of the "institution" of res judicata is no longer accepted. Nowadays, the reasoning for this foundation is substantially different. A judge, like any other human, is fallible. Therefore, today, the accepted reasoning is that this rule is justified by the practical necessity to prevent an indefinite litigation over the same matter and to prevent contradictory decisions which, axiomatically, would be particularly adverse to the credit that people would give to the justice system.

. . .

It is paramount to note . . . that the authoritative and obligatory force of a precedent upon other judges results not only from the principle of res judicata, but also from the concept that a contrary determination would effectively violate the principle or rule of law which formed the basis for the underlying decision, especially when the rule or principle of law relied upon has been repeatedly invoked and used and thus confirmed by other judges in other cases on either similar or

> identical sets of facts. A homogeneous judicial system in fact requires a recognition and adherence to the rules of law as adopted by the courts. The contrary would cause inconsistencies that would clearly render court decision relatively irrelevant and a system of justice with little or no credibility. In other words, judicial chaos.

(*Id.* PP 16, 26-27, 31).

Further, as IHC points out, Dr. El Kholy is admitted to practice in Egypt while Mr. El Nabli is not (although Mr. El Nabli is the resident partner in the Cairo office of Nable & Associates P.C.). *See, e.g., Usattore v. The Victoria*, 172 F.2d 434, 438-39 (2d Cir. 1949) (finding that the trial judge is not bound to accept the testimony of a witness concerning the meaning of the laws of a foreign country, especially when the expert has never practiced there).

Here, I reject Mr. El Nabli's opinion not only because he is not admitted in Egypt, the country on whose law he purports to opine, but, more importantly, because of the opinion's lack of substance. Mr. El Nabli's opinion is undoubtedly interesting to read on, for example, the comparisons between common law jurisdictions and civil law jurisdictions and the role of a civil law judge, (*see, e.g.*, El Nabli Aff. PP 13-20), and the similarity between Article 101 of the Law of Evidence of Egypt (relied on by Dr. El Kholy) and Articles 1350-51 of the Frenceh Civil Code, (*see id.* P 26), but it does not squarely answer the question presented. Instead, the question is changed to "were the matter brought before an Egyptian judge, with the same set of facts and

evidence, would said judge apply a different rule of law on the issue of defendant's liability," and answered with an ipse dixit "NO," (*id.* P 32), followed by an ipse dixit discussion without citation to or distinguishing of Article 101, (*see, e.g., id.* P 36). I reject this opinion as unpersuasive.

In contrast, Dr. El Kholy's conclusion that the collateral estoppel effect of prior decisions is limited to disputes involving "the same parties, the same object and the same cause of action" as the earlier decision, (El Kholy Aff. at 10), and thus would not apply to the present action, (*id.* at 11), appears to follow logically from Article 101 of the Law of Evidence of Egypt. As noted above, that section provides:

> The judgments which acquired the force of a judged matter have an authority as to the rights they have decided upon Evidence contradicting that authority is inadmissible. However, the said judgments have that authority only over disputes which arise among the same parties, without change of their capacities, and which relate tot he same right having the same object and the same cause of action. The Court shall apply this authority of its own motion.

(*Id.* at 4). My own examination of that statutory provision persuades me that Dr. El Kholy's conclusion is correct, viz., that an Egyptian court would not give collateral estoppel effect to the Egyptian Judgments in this action. Accordingly, I decline to do so. *See, e.g., Weiss*, 161 F. Supp. 2d at 313 n.7; *Voreep*, 1999 U.S. Dist. LEXIS 7294, 1999 WL 31181, at *3; *Schoenbrod*, 20 N.Y.2d at 409.

Appendix C

CONCLUSION

Plaintiffs' motion for partial summary judgment is denied. Counsel for all parties shall appear at a status conference on October 21, 2002, at 9:30 a.m., Room 1320, United States District Court, Southern District of New York, 500 Pearl Street, New York, New York.

SO ORDERED:

Dated: New York, New York

August 12, 2002

LORETTA A. PRESKA, U.S.D.J.

APPENDIX D — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED FEBRUARY 14, 2000

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket Nos. 97-7973, 99-7623

Karen Guidi, individually and as Executrix of the Estate of Robert L. Guidi; Eve Hoffman, individually and as Executrix of the Estate of Coby M. Hoffman; Merrill Kramer; Lois Kramer,

Plaintiffs-Appellants,

v.

Inter-Continental Hotels Corporation, a Delaware corporation; Inter-Continental Hotels Corporation, a corporation of the United Kingdom; Inter-Continental Hotels & Resorts Corporation; Semiramis Hotel Corp.; Saison Holdings; B.V.; Saison Corporation,

Defendants-Appellees.

December 2, 1999, Argued
February 14, 2000, Decided

Appendix D

OPINION:

AMENDED OPINION

OAKES, Senior Circuit Judge:

Karen Guidi, Eve Hoffman, Merrill Kramer, and Lois Kramer ("Plaintiffs") sued Inter-Continental Hotels Corporation and other defendants (collectively "IHC") on personal injury and wrongful death claims arising from a shooting in an Egyptian hotel managed by IHC. The United States District Court for the Southern District of New York, Loretta A. Preska, *Judge,* dismissed Plaintiffs' action on the ground of *forum non conveniens,* concluding that Egypt was the better forum for their suit. Plaintiffs now appeal this dismissal, arguing that the District Court applied the wrong legal standard for determining the proper forum in this case and mistakenly relied on the existence of related litigation in favor of the Egyptian forum. Because we agree with Plaintiffs that the District Court erred in concluding that their action should be heard in Egypt, we reverse.

BACKGROUND

In October 1993, Robert Guidi, Coby Hoffman, and Merrill Kramer were in Egypt on business. While eating dinner in the restaurant of the Semiramis Inter-Continental Hotel, which at the time was managed by IHC, all three men were shot by an Egyptian gunman named Farahat who had entered the hotel without triggering the suspicions of hotel security. In addition to the three Americans, Farahat shot a Syrian lawyer, a French lawyer, and an Italian judge. Of his

six victims, four died, including Robert Guidi and Coby Hoffman.

Immediately after the shooting, Farahat surrendered to hotel security and the Egyptian police. His claimed motivation for the shootings was religious extremism directed against foreigners. In the criminal prosecution that followed, Farahat was adjudged insane and committed to a government hospital in January 1994. He escaped from the hospital in September 1997 and the same day, with the help of at least one other person, killed ten more people in an attack on a tour bus.

Plaintiffs filed suit against IHC on October 20, 1995, joining the wrongful death claims of Guidi's and Hoffman's widows with the personal injury claims of Kramer and his wife. At the time of suit, Mrs. Guidi and Mrs. Hoffman were residents of New Jersey and the Kramers resided in Maryland. Because IHC is a Delaware company with its principal place of business in New York City and diversity existed between the parties, Plaintiffs elected to bring their action in the Southern District of New York. On July 7, 1996, IHC moved for dismissal on the ground of *forum non conveniens,* arguing that information critical to its defense could be obtained only in Egypt, that the cost of defending itself in New York would be prohibitive, that it would be unable to implead Egyptian third parties, and that an Egyptian court would better be able to apply Egyptian tort law. Plaintiffs opposed IHC's motion on several fronts, including that American plaintiffs should not be compelled to sue an American defendant in a foreign country and that Plaintiffs were emotionally unable to travel to Egypt for a trial.

Appendix D

In January 1997, IHC submitted supplemental information to the District Court which indicated that the families of the Italian judge and the French lawyer, whom Farahat had killed in the same incident that gave rise to this case, had commenced wrongful death actions in the Egyptian courts.

On July 17, 1997, the District Court granted IHC's motion to dismiss.[1] Applying the *forum non conveniens* balancing test outlined by the Supreme Court in *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 91 L. Ed. 1055, 67 S. Ct. 839 (1947), the court found that with respect to the private interests of the litigants, the balance slightly favored the Egyptian forum because a viewing of the premises would be possible there and because IHC would be able to implead the Egyptian government as a third party. Turning to the public interest factors presented by the case, the court found that (1) the Southern District of New York has an overburdened docket; (2) Egypt has a greater interest in the litigation than New York because it is committed to protecting its tourist industry; (3) an Egyptian court would be more familiar with Egyptian law and have a greater interest in its

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1. The Background section of the District Court's Memorandum and Order identifies the basis for IHC's motion as 28 U.S.C. § 1404, the statute which governs transfers of venue between federal courts within the United States. Because this case does not involve a transfer to another federal court, § 1404 has no application here. The court, however, did not analyze the case under the law of § 1404, but correctly looked to the law of *forum non conveniens* on all but one point. We address that point in Section II.

application; and (4) most significantly, there were two related lawsuits pending in Egypt at the time of dismissal. The court concluded that these public interest factors decisively favored the Egyptian forum, and dismissed the case on that basis.

In November 1997, Plaintiffs filed for relief from the district court's dismissal under Fed. R. Civ. P. 60(b)(6), providing evidence of increasing terrorist activity against tourists in Egypt since the time of the dismissal. Plaintiffs' evidence included the escape and subsequent killing of ten tourists by Farahat in September 1997, as well as the terrible attack at Luxor in November 1997 that resulted in the deaths of more than 50 foreigners. Plaintiffs' motion was denied by an order dated April 16, 1999.

Plaintiffs challenge both the dismissal of their action and the denial of relief under Rule 60(b)(6) in this consolidated appeal. Plaintiffs argue primarily that the district court applied an incorrect legal standard for cases in which an American plaintiff seeks an American forum and relied excessively on the existence of related litigation in Egypt. Plaintiffs also question the district court's failure to give proper weight to the emotional toll and threats to personal safety faced by Plaintiffs if forced to bring their action in Egypt.

DISCUSSION

We have recognized that our review of a *forum non conveniens* dismissal is limited to whether a district court abused its broad discretion to dismiss on such grounds. *Peregrine Myanmar Ltd. v. Segal,* 89 F.3d 41, 46 (2d Cir.

1996); *Scottish Air Int'l, Inc. v. British Caledonian Group, PLC,* 81 F.3d 1224, 1232 (2d Cir. 1996). Our limited review, however, encompasses "the right to determine whether the district court reached an erroneous conclusion on either the facts or the law." *R. Maganlal & Co. v. M.G. Chem. Co.,* 942 F.2d 164, 167 (2d Cir. 1991) (internal quotation omitted).

Plaintiffs believe that the district court abused its discretion in at least two ways by deciding that Egypt was the better forum for this case. First, Plaintiffs argue that the district court failed to accord appropriate deference to their choice of forum as required by *Koster v. Lumbermens Mut. Cas. Co.,* 330 U.S. 518, 524, 91 L. Ed. 1067, 67 S. Ct. 828 (1947), and *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 241, 70 L. Ed. 2d 419, 102 S. Ct. 252 (1981). Second, Plaintiffs contest the significance given by the district court to the related wrongful death cases pending in Egypt at the time of its decision, and argue that the district court confused *forum non conveniens* with transfer to another federal court under 28 U.S.C. § 1404(a). Although we do not agree with Plaintiffs that *Koster* establishes a different *forum non conveniens* standard for American citizens than that set forth in the more familiar case of *Gilbert, see Alcoa Steamship Co. v. M/V Nordic Regent,* 654 F.2d 147, 152 (2d Cir. 1980) (en banc), we do find that the district court did not give sufficient weight to Plaintiffs' choice of forum and relied too heavily on the existence of the Egypt litigation. Moreover, we believe that the special circumstances presented by this case—specifically, the emotional burden on Plaintiffs of returning to the country where they or their loved ones were shot in an act of religious terrorism—provide additional weight for favoring Plaintiffs' choice of their home forum for this litigation.

Appendix D

I. Plaintiff's Choice of Forum under *Koster* and *Gilbert*

In 1947, the Supreme Court decided the companion cases *Koster,* 330 U.S. 518, 91 L. Ed. 1067, 67 S. Ct. 828, (1947), and *Gilbert,* 330 U.S. 501, 91 L. Ed. 1055, 67 S. Ct. 839, (1947). In these two cases, the Court laid out the approach to *forum non conveniens* that is still followed in federal courts today.[2] *See, e.g., Piper Aircraft Co.,* 454 U.S. at 241, 102 S. Ct. 252; *Scottish Air Int'l,* 81 F.3d at 1232. In *Gilbert,* which involved a plaintiff who brought suit outside his home forum, *see* 330 U.S. at 502, the Court set forth a balancing test of private and public interests to guide courts' discretion in determining whether a more convenient forum exists. *See id.* at 508-09. While *Gilbert* acknowledged that "the plaintiff's choice of forum should rarely be disturbed," "unless the balance [of factors] is strongly in favor of the defendant," *id.* at 508, *Koster,* which involved a plaintiff who had chosen to sue in his home forum, more explicitly stated that:

> Where there are only two parties to a dispute, there is good reason why it should be tried in the plaintiff's home forum if that has been his choice. He should not be deprived of the presumed

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2. As the Supreme Court has noted, the enactment of 28 U.S.C. § 1404 (1998), which controls interstate transfers of cases in federal courts, had the effect of limiting *forum non conveniens* analyses to cases such as this one where the alternative forum is the court of another country. *See American Dredging Co. v. Miller,* 510 U.S. 443, 449 n.2, 127 L. Ed. 2d 285, 114 S. Ct. 981 (1994).

> advantages of his home jurisdiction except upon a clear showing of facts which either (1) establish such oppressiveness and vexation to a defendant as to be out of all proportion to plaintiff's convenience, which may be shown to be slight or nonexistent, or (2) make trial in the chosen forum inappropriate because of considerations affecting the court's own administrative and legal problems. In any balancing of conveniences, a real showing of convenience by a plaintiff who has sued in his home forum will normally outweigh the inconvenience the defendant may have shown.

330 U.S. at 524. Thus, *Koster* is "a consistent, pragmatic application of *Gilbert*," *Alcoa*, 654 F.2d at 152, in the home forum context.

The Supreme Court has recognized that a district court may, in the exercise of its sound discretion, dismiss a case "when an alternative forum has jurisdiction to hear the case, and when trial in the chosen forum would 'establish . . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience,' or when the 'chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems.'" *Piper Aircraft*, 454 U.S. at 255 & n.23. Although a citizen's choice of forum is not dispositive for the purposes of *forum non conveniens*, a plaintiff's choice of forum is entitled to greater deference when the plaintiff has chosen the home forum. *See id.*[3] Here, the

3. We held in *Alcoa* that the American citizenship of a plaintiff does not justify creating a special rule in *forum non*

(Cont'd)

district court did not accord such deference, or even mention *Koster,* in its application of the *Gilbert* private and public interest factors. This omission and consequent failure to grant Plaintiff's choice of an American forum significant deference was unsound.

In this case, Plaintiffs argue—and we agree—that their "home forum" as American citizens is a United States court, such as the courts of the Southern District of New York.[4]

(Cont'd)
conveniens cases, and that the *Gilbert* standard is the proper standard to apply. 654 F.2d at 159. *Piper Aircraft,* however, establishes that *Koster* retains its vitality in the balancing of conveniences required under *Gilbert.* Our holding today does not contravene our holding in *Alcoa,* but rather follows *Piper Aircraft* 's dictate that a heightened deference should be given in the balancing of conveniences to an American citizen's choice of his or her home forum.

4. The district court noted in a footnote to its decision that Plaintiffs were not citizens of New York and that the presumption in favor of their choice of the Southern District of New York was therefore weakened. Although the district court did not rely heavily on this fact in concluding that Egypt was the better forum, we find that the states where Plaintiffs reside are not relevant to the *forum non conveniens* analysis in this case. *See Reid-Walen v. Hansen,* 933 F.2d 1390, 1394 (8th Cir. 1991) (in a *forum non conveniens* case involving a foreign court, "the 'home forum' for the plaintiff is any federal district in the United States, not the particular district where the plaintiff lives.").

Under the standard articulated in *Gilbert* and *Koster*[5], Plaintiffs' decision to sue in New York should not be disturbed unless the balance of factors is strongly in favor of IHC. *See Gilbert,* 330 U.S. at 508. We conclude that IHC has not met its burden of showing that the aggregate of relevant factors weighs heavily on the side of dismissal: IHC is a corporate defendant with its principal place of business in New York and is being sued for a relatively simple tort violation. Plaintiffs, in contrast, are ordinary American citizens for whom litigating in Egypt presents an obvious and significant inconvenience, especially considering their adverse experience with that country to date. This is not a case where the plaintiff is a corporation doing business abroad and can expect to litigate in foreign courts. *See Reid-Walen,* 933 F.2d at 1395 (courts partially discount citizenship when plaintiff does extensive foreign business); *Contact Lumber Co. v. P.T. Moges Shipping Co.,* 918 F.2d 1446, 1449-50 (9th Cir. 1990) (same) (citing *Mizokami Bros. of Ariz., Inc. v. Baychem Corp.,* 556 F.2d 975, 978 (9th Cir. 1977)).

Under the circumstances presented here, we can see no reason to make an exception to the presumption that "a real showing of convenience by a plaintiff who has sued in his home forum will normally outweigh the inconvenience the defendant may have shown." *Koster,* 330 U.S. at 524; *see Gilbert,* 330 U.S. at 508.

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5. The *Koster* criterion regarding the administrative and legal problems of the chosen court has no application here. Although the district court noted that the Southern District of New York is "heavily overburdened," the recent filling of all judicial vacancies and the resulting full complement of judges for the District makes this concern of little or no present significance.

Indeed, the district court, in its analysis of the private interest factors under *Gilbert,* concluded that the degree of inconvenience to IHC of litigating in the United States did not offer a basis for dismissing the case. After considering IHC's arguments regarding its need to implead Egypt as a third party, the availability of witnesses and evidence, the cost of obtaining depositions, and the possibility of a jury view in Egypt, the district court found that these factors "d[id] not strongly favor" the Egyptian forum. *See Guidi v. Inter-Continental Hotels Corp.*, 1997 WL 411469, at *3 (S.D.N.Y. 1997). IHC therefore did not carry its burden under *Gilbert* and *Koster* to demonstrate that the balance of conveniences tipped strongly in its favor.

In the balancing of conveniences, we believe that the substantial and unusual emotional burden on Plaintiffs if they were required to travel to Egypt provides additional support for keeping the case in their chosen forum of New York.

Plaintiffs are atypical in that they are either the widows or the victim of a murderous act directed specifically against foreigners. Understandably, they are strongly adverse to litigating in a country where foreigners have been the target of hostile attacks, and have concerns for their own safety if required to travel there to bring their suit. Plaintiffs have supplied us with ample evidence of terrorist attacks occurring after the events giving rise to their action—including the subsequent killing of nine foreign tourists by the very man who attacked Plaintiffs—which give credence to Plaintiffs' uncertainty as to the safety of American visitors to Egypt insofar as fear of religious extremism is concerned.

Appendix D

In its *forum non conveniens* analysis, the district court did not even mention, much less give any weight to, the emotional burden faced by Plaintiffs if the case were to be heard in Egypt. In the subsequent Fed. R. Civ. P. 60(b) motion filed by Plaintiffs on this specific point, the district court affirmed its decision to dismiss the case in favor of the Egyptian forum and rejected the argument that Plaintiffs' concerns tilted the balance in favor of keeping the case in New York. For the purposes of *forum non conveniens,* however, "the ultimate inquiry is where trial will best serve the convenience of the parties *and the ends of justice.*" *Koster,* 330 U.S. at 527 (emphasis added); *see also Maganlal,* 942 F.2d at 167. We believe that justice is best served in this case by acknowledging the unique and heavy burden placed on Plaintiffs if they are required to litigate in Egypt. In balancing the interests at stake for the purposes of *forum non conveniens,* the district court should have taken into account the unusual circumstances of Plaintiffs that weigh strongly in favor of the New York forum.

Because the district court gave inadequate significance to Plaintiffs' choice of forum as American citizens and failed to consider Plaintiffs' emotional burden of having to travel to Egypt for trial in its balancing, we find that its determination that Egypt was the better forum for this litigation was erroneous. Plaintiffs' decision to bring their suit in New York rather than in a foreign country should not be disturbed.

Appendix D

II. *The Related Litigation*

In its weighing of the *Gilbert* public interest factors to determine the best forum for this case, the district court stated that the strongest public interest factor in favor of the Egyptian forum was the related litigation pending there at the time of its decision. The district court found that because the families of two other hotel guests who were killed by Farahat had brought suit in Egypt, although not against IHC, it would be most efficient if Plaintiffs' claims were heard in Egypt as well. To support its finding, the district court cited several cases based on 28 U.S.C. § 1404(a) which hold that related litigation in the transferee forum weighs heavily in favor of transfer.

The district court's reliance on 28 U.S.C. § 1404(a), which controls the transfer of cases among the federal courts within the United States, was not correct. As the Supreme Court recognized in *Piper Aircraft*, " § 1404(a) transfers are different than dismissals on the ground of *forum non conveniens*. . . . District courts [a]re given more discretion to transfer under § 1404(a) . . . [because] [t]he statute was designed as a 'federal housekeeping measure,' allowing easy change of venue within a unified federal system." 454 U.S. at 253-54 (quoting *Van Dusen v. Barrack*, 376 U.S. 612, 613, 11 L. Ed. 2d 945, 84 S. Ct. 805 (1964)). When, as here, the alternative forum is the court of a foreign country, the law of § 1404(a) has no application because "the differences between trial in an American court and a foreign court will almost inevitably be greater than those between trial in two federal courts in the United States." *Nalls v. Rolls-Royce Ltd.*, 226 U.S. App. D.C. 276, 702 F.2d 255, 261 (D.C. Cir. 1983).

Appendix D

The existence of related litigation, while of major significance in § 1404(a) cases, is not listed as a relevant factor in the *forum non conveniens* analysis laid out in *Gilbert.* 330 U.S. 501, 508-09, 91 L. Ed. 1055, 67 S. Ct. 839. Moreover, we can find no case that gives such litigation the significance accorded by the district court here, when the parties in the related action are completely different from the parties at bar. In the two *forum non conveniens* cases cited by the district court to support its decision, the parties to the American and foreign actions were identical and there was the likelihood of "significant duplication of legal efforts on behalf of all the parties." *C-Cure Chem. Co. v. Secure Adhesives Corp.,* 571 F. Supp. 808, 822 (W.D.N.Y. 1983); *see also Ocean Shelf Trading, Inc. v. Flota Mercante Grancolombiana S.A.,* 638 F. Supp. 249, 253 (S.D.N.Y. 1986). The private interests of the litigants— relevant under *Gilbert*—were therefore implicated in these cases in a manner not present here. We are not persuaded that such cases, in the absence of more apposite authority, require us to uphold the reasoning of the district court that Plaintiffs' case would be more efficiently heard in Egypt.

Although we are unwilling to say that the existence of related litigation in another country should never be considered for the purposes of *forum non conveniens,* we conclude that it was unsound for the district court to rely on § 1404(a) in giving the Egyptian litigation such decisive weight in this case.

CONCLUSION

For the foregoing reasons, we find that the district court abused its discretion in deciding that Egypt was the better forum for this litigation. We therefore reverse its dismissal and return the case to the Southern District of New York.

APPENDIX E — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK FILED APRIL 20, 1999

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

95 Civ. 9006 (LAP)

KAREN GUIDI, Individually and as Executrix of the Estate of ROBERT L. GUIDI, EVE HOFFMAN, Individually and as Executrix of the Estate of COBY M. HOFFMAN, MERRILL KRAMER and LOIS KRAMER,

Plaintiffs,

v.

INTER-CONTINENTAL HOTELS CORPORATION, a Delaware Corporation, INTER-CONTINENTAL HOTELS CORPORATION, a Corporation of the United Kingdom, INTER-CONTINENTAL HOTELS & RESORT CORPORATION, SEMIRAMIS HOTEL CORP., SAISON HOLDINGS, B.V., SAISON CORPORATION,

Defendants.

April 16, 1999, Decided
April 20, 1999, Filed

Appendix E

OPINION:

MEMORANDUM and ORDER

LORETTA A. PRESKA, United States District Judge:

Plaintiffs have moved pursuant to Fed. R. Civ. P. 60(b) for relief from a memorandum and order issued by this Court on July 17, 1997 (the "Order") which dismissed this action on forum non conveniens grounds. For the reasons set forth below, plaintiffs' motion is denied.

BACKGROUND

The tragic events that gave rise to this action took place in the Semiramis Hotel in Cairo, Egypt (the "Hotel") in 1993. On October 26 of that year, Robert L. Guidi ("Guidi"), Coby M. Hoffman ("Hoffman"), and Merrill Kramer ("Kramer") were attacked by a gunman named Saber Farahat in the restaurant of the Hotel. As a result, Guidi and Hoffman were killed, and Kramer was seriously injured. *See Guidi v. Inter-Continental Hotels Corp.*, 1997 U.S. Dist. LEXIS 10444, No. 95 Civ. 9006 (LAP), 1997 WL 411469, at *1 (S.D.N.Y. July 18, 1997). Plaintiffs commenced this suit on October 20, 1995, alleging that the defendants' negligent security measures caused the deaths of Guidi and Hoffman and the injuries of Kramer. *See id.* The families of other foreign nationals who were killed in the shooting at the Hotel brought suit in Egypt against the Intercontinental Semiramis Hotel on December 3, 1996. *See id.*

Appendix E

DISCUSSION

In essence, plaintiffs contend that they would be at an unreasonable risk of terrorist attack if forced to bring this action in Egypt, thus justifying relief under Fed. R. Civ. P. 60(b).[1] Plaintiffs argue that foreigners in Egypt are prone to attack by Islamic militant groups and that plaintiffs are at greater risk than the average foreigner. Specifically, plaintiffs argue that Islamic militant groups "are motivated by the concept of reprisal or revenge" and might attack plaintiffs because they would be litigating a matter which stemmed from a terrorist attack. (*See* Horowitz Aff. PP 11, 16-17). Plaintiffs also contend that they are at particular risk because Egyptian terrorists might seek to "'finish the job'" that was begun in the Hotel restaurant. (*See* Plaintiffs' Reply Brief, dated December 24, 1997 at 4).

A. Newly Discovered Evidence

Rule 60(b)(2) allows courts to relieve parties from a final order when there is "newly discovered evidence which by due diligence could not have been discovered in time. . . ." Fed. R. Civ. P. 60(b)(2). The Court of Appeals has instructed

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1. Plaintiffs did not include a memorandum of law in their moving papers, but the moving affidavit seeking relief under Rule 60(b) makes references to "newly discovered evidence," (*see* Affidavit of Barry Horowitz, sworn to on November 14, 1997 ("Horowitz Aff.") PP 2, 7-8), which would seem to request relief under Rule 60(b)(2). Plaintiffs' reply memorandum, however, requests relief under Rule 60(b)(6) alone. Notwithstanding this ambiguity, I will analyze the motion according to both sections of Rule 60(b).

that the evidence covered by this rule must constitute facts that existed at the time of trial or time of the order. *See Ryan v. United States Lines Co.*, 303 F.2d 430, 434 (2d Cir. 1962) (results of post-trial physical examination not newly discovered evidence); 12 *Moore's Federal Practice*, § 60.42[3] at 60-116 (3d ed.). Accordingly, the events that plaintiffs seek to introduce which occurred after the date of the issuance of the Order on July 17, 1997, such as the killing of sixty foreign tourists at Luxor on November 17, 1997 or Saber Farahat's escape from a mental institution and firebombing of a bus of German tourists on September 18, 1997, do not qualify as "newly discovered" under 60(b)(2).

Additionally, the party must have been unaware of the existence of the evidence before the final judgment. *See Parrilla-Lopez v. United States*, 841 F.2d 16, 19 (1st Cir. 1988). In other words, "the losing party cannot meet the 'discovery' requirement when, as is all too frequent, the party knew of the existence of the witness, and the substance of the witness' testimony, but thought that the witness was not needed until the case was lost." 12 *Moore's Federal Practice*, § 60.42[4][a] at 60-118. Thus, details of terrorist attacks in Egypt known to plaintiffs before July 17, 1997, and which were briefly mentioned in Kramer's affidavit in opposition to the defendants' motion to dismiss, do not constitute "newly discovered evidence."

Accordingly, plaintiffs' motion, to the extent that it asks for relief pursuant to Rule 60(b)(2), is denied.

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B. Any Other Reason Justifying Relief

As the Supreme Court has instructed, Rule 60(b)(6) "grants federal courts broad authority to relieve a party from a final judgment . . . provided that the motion . . . is not premised on one of the grounds for relief premised in clauses (b)(1) through (b)(5)." *Liljeberg v. Health Services Corp.*, 486 U.S. 847, 863 & n.11, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988). I have examined the grounds for plaintiffs' motion and, because it does not fall within the scope of the first five clauses of Rule 60(b), determine that it is properly considered under Rule 60(b)(6).

Rule 60(b)(6) has been described as a "grand reservoir of equitable power to do justice in a particular case," *United States v. Cirami*, 563 F.2d 26, 32 (2d Cir. 1977) (quotation omitted), and it is to be liberally applied to achieve justice, *see Matarese v. LeFevre*, 801 F.2d 98, 106 (2d Cir. 1986) (quotation omitted), *cert. denied*, 480 U.S. 908, 94 L. Ed. 2d 523, 107 S. Ct. 1353 (1987), in the proper case, *see Cirami*, 563 F.2d at 32 (emphasis added). The proper case, however, is one involving "extraordinary circumstances," *see Liljeberg*, 486 U.S. at 863, or "extreme hardship," *see United States v. Karahalias*, 205 F.2d 331, 333 (2d Cir. 1953). Generally, Rule 60(b)(6) is narrowly interpreted. *See* 12 Moore's Federal Practice, § 60.48[1] at 60-167.

Because I cannot agree that plaintiffs have alleged circumstances that are extraordinary or which create undue hardship, relief under 60(b)(6) is not warranted. As for the threats posed to foreigners generally, defendants have submitted undisputed evidence that in 1998 there were no

terrorist attacks against foreigners in Egypt. (*See* United States Consular Information Sheet, attached to Letter from Wallace to Judge Preska of 1/15/99 ("Wallace Letter")). As for the alleged particular risks to themselves, plaintiffs do not dispute that the suits brought in Egypt by other foreigners injured in the attack have not initiated any attacks on those parties bringing suit in Egypt or their representatives. In fact, it does not appear that those cases are "high profile" or covered in the local media as the plaintiffs fear even though those cases have proceeded in the Egyptian courts for over two years. (*See* Wallace Letter at 2). As a practical matter, moreover, plaintiffs are unlikely to be called as witnesses or required to attend proceedings in Egypt. Plaintiffs Guidi and Hoffman were not witnesses to any of the events at the Hotel, and, as defendants have noted, plaintiffs can submit written testimony.

Furthermore, relief from an order under Rule 60(b) is also inappropriate when it would cause prejudice to a party. *See Amernational Indust. v. Action-Tungsram*, 925 F.2d 970, 977 (6th Cir.), *cert. denied*, 501 U.S. 1233 (1991). In the Order, I discussed defendants' ability to implead the Egyptian government as a third party. Defendants represented that the Egyptian government played a public role in that it designed security measures for all Egyptian hotels. Under the Foreign Sovereign Immunities Act ("FSIA"), the Egyptian government would be immune from impleader for its public acts, and thus I held that that private interest factor favored Egypt as the proper forum. *See* Guidi, 1197 WL 411469, at *5 (citing 28 U.S.C. § 104-07). That factor remains in force and favors denying plaintiffs' motion.

Appendix E

At bottom, plaintiffs' motion urges me to reconsider my dismissal of the action on forum non conveniens grounds in light of the alleged threat of terrorist attacks. (*See* Horowitz Aff. P 5) (stating that the Court "failed to adequately consider that the plaintiffs' prosecution of their claims in the allegedly 'available' forum of Egypt would place the plaintiffs themselves in physical danger"). In support of that argument, plaintiffs rely on *Rasoulzadeh v. Associated Press*, 574 F. Supp. 854 (S.D.N.Y. 1983), *aff'd*, 767 F.2d 908 (1985), and *Odita v. Elder Dempster Lines, Ltd.*, 286 F. Supp. 547 (S.D.N.Y. 1968), but that reliance is misplaced. *See also Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189 (S.D.N.Y. 1996) (denying forum non conveniens motion in an action brought by former Ghanian trade counsellor under Alien Tort Claims Act and Torture Victim Protection Act against Ghanian Deputy Chief of National Security for alleged acts of torture).

Without resolving the propriety of such an argument in a Rule 60(b) motion, plaintiffs' argument lacks merit. Rasoulzadeh, Odita and Cabiri stand for the limited principle that transferring a case to a foreign forum makes little sense when conditions of that forum "plainly demonstrate that plaintiffs are highly unlikely to obtain basic justice therein." *Rasoulzadeh*, 574 F. Supp. at 861 (citing *Vaz Borralho v. Keydril Co.*, 696 F.2d 379, 393-94 (5th Cir. 1983)). The factual circumstances in those cases validated that principle but the facts here do not. In Rasoulzadeh, plaintiffs were Iranian citizens in the process of seeking political asylum. There, the plaintiffs alleged that the defendant improperly sublet premises to the Canadian Press. Plaintiffs argued that Canadians were in official disfavor as a result of the Canadian Embassy's actions after the seizure of the American Embassy

in Iran, when it sheltered and engineered the escape of American diplomats. *See* 574 F. Supp. at 855. Judge Haight agreed with plaintiffs, stating that plaintiffs had no ability to "obtain justice at the hands of the courts administered by Iranian mullahs" and that they would probably be shot if they returned. *Id.* at 861.

Similarly, in Cabiri, the plaintiff, who had also filed for political asylum in the United States, feared persecution from the government of Ghana if he returned to that nation because his suit alleged that a high-ranking government official had tortured him. 921 F. Supp. at 1198. In *Odita*, the court held that requiring the plaintiff to try his suit in Great Britain "might effectively deny him any remedy at all." *Odita*, 286 F. Supp. at 551. There, the court determined that the plaintiff would probably be denied permission to enter Great Britain to sue, and, if admitted, the plaintiff was too poor to bring suit. *See id.*

Unlike the cases discussed above, plaintiffs do not allege facts that indicate a high likelihood that basic justice will not be obtained. They do not allege that the Egyptian government or court system would persecute them or that the conditions of the foreign forum would effectively deny them the possibility of a judicial remedy. Additionally, the fact that no terrorist attacks have occurred in 1998 and that the other suits against the defendants brought in Egypt have proceeded without mishap, combines with the other factors mentioned in the Order to continue to tilt the balance in favor of dismissal on forum non conveniens grounds.

Appendix E

While I certainly sympathize with the plaintiffs' discomfort at returning to or appearing at the scene of the tragic events that initiated this action, I cannot agree that extraordinary circumstances exist which merit relief. The Gulf Oil factors considered in the Order are the judicial system's measure of fairness to both sides of a case, not just to plaintiffs, and to the public. The analysis under those factors has not changed, and, accordingly, relief from the judgment is not warranted. Finally, I observe that here, unlike most of the cases where relief is granted under Rule 60(b)(6), *see Klapprott v. United States*, 335 U.S. 601, 69 S. Ct. 384, 93 L. Ed. 266 (1949), plaintiffs are not foreclosed from obtaining a judicial remedy; they can bring their claims against the defendants in Egypt.

CONCLUSION

For the reasons stated above, plaintiff's motion is denied. The Clerk of the Court shall mark the matter closed and all pending motions are denied as moot.

SO ORDERED.

April 16, 1999

New York, New York

LORETTA A. PRESKA, USDJ

APPENDIX F — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK FILED JULY 18, 1997

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

95 Civ. 9006 (LAP)

KAREN GUIDI, Individually and as Executrix of the Estate of ROBERT L. GUIDI, EVE HOFFMAN, Individually and as Executrix of the Estate of COBY M. HOFFMAN, MERRILL KRAMER and LOIS KRAMER,

Plaintiffs,

- against -

INTER-CONTINENTAL HOTELS CORPORATION, a Delaware Corporation, INTER-CONTINENTAL HOTELS CORPORATION, a Corporation of the United Kingdom, INTER-CONTINENTAL HOTELS AND RESORT CORPORATION, SEMIRAMIS HOTEL CORP., SAISON HOLDINGS, B.V., SAISON CORPORATION,

Defendants.

July 17, 1997, Decided
July 18, 1997, FILED

Appendix F

OPINION:

MEMORANDUM AND ORDER

LORETTA A. PRESKA, United States District Judge:

BACKGROUND

On October 26, 1993, Robert L. Guidi ("Guidi"), Coby M. Hoffman ("Hoffman"), and Merrill Kramer ("Kramer") were guests in the Semiramis Hotel, located in Cairo, Egypt. Guidi, Hoffman, and Kramer were sitting in the hotel restaurant when a gunman, later identified as Sabir Farahat, opened fire, killing Guidi and Hoffman and seriously injuring Kramer. The additional victims of the attack were a French and an Italian hotel guest who were killed, and a Syrian and two Egyptians who were injured.

The Semiramis Hotel is a luxury hotel that caters to an international clientele. At the time of the shooting, the hotel restaurant was crowded with both locals and tourists. *See* Financial Times, October 28, 1993, p. 4. Following the shooting, the Egyptian Tourist Police and the Ministry of Interior conducted an official investigation of the incident. Their findings in part led to the Attorney General of Central Cairo declining to pursue a criminal indictment of Farahat, whom he found to lack mental capacity. (Affidavit of Robert B. Wallace, counsel for defendant IHC, sworn to on July 17, 1996 ("Wallace Aff."), Ex. B). The gunman remains in a mental institution. (Wallace Aff., P 11).

Appendix F

Plaintiffs brought suit in this court on October 20, 1995, alleging that the deaths of Guidi and Hoffman and the injuries of the plaintiffs resulted from defendants' negligent security measures. Of the six defendants named in the Complaint, only defendant Inter-Continental Hotels Corp. ("IHC"), a Delaware corporation that manages the Semiramis Hotel, has been served. The families of the other hotel guests who died in the shooting, Mr. Fernand Boulan, a French national, and Mr. Luigi Daga, an Italian national, have both filed suit in Egypt on December 3, 1996 against the Intercontinental Semiramis Hotel.

IHC now moves for dismissal based on the doctrine of forum non conveniens, under 28 U.S.C. § 1404. For the reasons that follow, defendant's motion is granted.

DISCUSSION

District courts have broad discretion when deciding whether to dismiss an action on forum non conveniens grounds. *R. Maganlal & Co. v. M.G. Chem. Co.*, 942 F.2d 164, 167 (2d Cir. 1997). The first step of a forum non conveniens inquiry is to determine whether an adequate alternative forum exists. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22, 70 L. Ed. 2d 419, 102 S. Ct. 252 (1981). The next step is to apply the balancing test the Supreme Court set forth in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 91 L. Ed. 1055, 67 S. Ct. 839 (1947). The Gulf Oil analysis requires that I consider the "private interest of the litigants," including: (1) relative ease of access to sources of proof; (2) availability of compulsory process to secure the attendance of unwilling witnesses; (3) cost of obtaining the

attendance of witnesses; (4) possibility of viewing the premises, if relevant to the action; and (5) "all other practical problems that make trial of a case easy, expeditious, and inexpensive." *Id.* at 508. I must also balance the "public interest" factors, including: (1) court administrative difficulties; (2) burdens on the jury pool; (3) the "local interest in having localized controversies decided at home;" and (4) the appropriateness of trying a case in a forum familiar with the governing law of the case. *Id.* at 508-09.

I acknowledge that plaintiffs, as American citizens who have chosen to litigate in a United States court, are entitled to a certain degree of deference regarding this choice.[1] *Piper*, 454 U.S. at 256. Despite this deference, courts have dismissed on forum non conveniens grounds where "an alternative forum has jurisdiction to hear the case and the private interests of the forum clearly point towards trial in the alternative forum." *Cruz v. Maritime Co. of Philippines*, 549 F. Supp. 285, 289 (S.D.N.Y. 1982), *aff'd* 702 F.2d 47 (2d Cir. 1983).

I. Egypt is an Adequate Alternative Forum

Egypt represents an obvious alternative forum to the Southern District of New York, because the shooting occurred there. Whether Egypt is an adequate alternative forum

1. Some courts within this district have held that this presumption favoring plaintiffs' choice of forum is weakened when the plaintiff is not a citizen of the forum. *See Hasakis v. Trade Bulkers, Inc.*, 690 F. Supp. 260, 262 (S.D.N.Y. 1988). In this case, plaintiffs are citizens and residents of New Jersey and Maryland and are not suing in their home state.

depends, in part, on whether the defendant is subject to service of process there. *Piper*, 454 U.S. at 254, n.22. Even where the defendant is open to suit in the alternate forum, however, courts do not dismiss on forum non conveniens grounds when the foreign jurisdiction prohibits litigation of the relevant subject matter, or "in rare circumstances" where the alternative forum offers only a "clearly unsatisfactory remedy." *Travelers Indem. Co. v. S/S Alca*, 710 F. Supp. 497, 502 (S.D.N.Y.), *aff'd without opinion*, 895 F.2d 1410 (2d Cir. 1989) (quoting *Piper Aircraft*, 454 U.S. at 254, n.22.)

On the issue of whether defendant is amenable to suit in Egypt, IHC has agreed to accept process in Egypt. (Reply Affidavit of Robert B. Wallace, sworn to on August 30, 1996 ("Reply Wallace Aff.") at 4-5). Accordingly, IHC is amenable to suit there. The second part of this inquiry is whether Egypt would provide an adequate remedy. Article 163 of the Egyptian Civil Code allows for recovery in tort when the defendant caused a wrongful act and the plaintiff is injured as a result. Articles 221 and 222 allow Egyptian courts to award damages for actual loss, financial loss, and for pain and suffering to the immediate family of the decedent. *See Miller v. United Technologies Corp.*, 40 Conn. Supp. 457, 515 A.2d 390, 394 (Conn. 1986). Therefore, the Egyptian courts permit litigation of this type of suit.

Plaintiffs assert, however, that several differences between the United States and the Egyptian court systems make dismissal inappropriate. Plaintiffs claim that Egypt is an inadequate forum because their chosen American counsel will not be able to appear in an Egyptian court, they will be denied the right to present live testimony or to cross-examine

witnesses, and they will be unable to acquire Egyptian counsel on a contingency fee basis. Plaintiffs further point to the fact that no right to a jury trial exists in Egypt and to the limited nature of discovery in Egypt.

None of these assertions make Egypt an inadequate forum. Defendant contends that plaintiffs' chosen American counsel can assist Egyptian counsel out of court or can appear before Egyptian courts after obtaining permission from the Egyptian Bar Association. (Wallace Reply Aff., P 23). In any event, plaintiffs' chosen attorney can continue to provide counsel and advice even if unable to appear in court. As for live testimony and cross-examination, defendant contends that Egyptian courts are no more restrictive than United States courts, limiting evidence only where corresponding documents are unambiguous or when testimony is irrelevant. Id. at P 22. Even if Egyptian courts are more restrictive than United States courts, the plaintiffs will not be denied the opportunity to present critical evidence.

Moreover, jury trials in civil cases are rare in many jurisdictions, as are attorneys willing to be retained on a contingency fee basis. *See* In Re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in *December, 1984*, 634 F. Supp. 842, 851 (S.D.N.Y. 1986) (citing *Piper*, 454 U.S. at 252, n.18); *aff'd as modified*, 809 F.2d 195 (1987), *cert. denied*, 484 U.S. 871 (1987). These factors also fail to make Egypt an inadequate forum. With respect to differences in discovery procedures between the two fora, defendant has agreed to provide all discovery to which plaintiffs would be entitled under the Federal Rules of Civil Procedure. (Wallace Reply Aff., P 25).

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Defendant has agreed to accept process in Egypt, the Egyptian courts are open to litigation of this subject matter, and the remedy they provide is not clearly unsatisfactory. Therefore, Egypt is an adequate alternative forum. *See Nippon Fire & Marine Insurance Co., Ltd. v. M.V. Egasco Star*, 899 F. Supp. 164, 167 (S.D.N.Y. 1995) (finding Egypt to be an adequate alternative forum), *aff'd*, 104 F.3d 351 (2d Cir. 1996).

II. "Private Interest" Factors

I now turn to the Gulf Oil analysis to determine whether the private and public interests implicated in the present action make Egypt the more preferable forum, in addition to being an adequate forum. The private interests implicated in the present action do not strongly favor either the United States or Egypt. The parties sharply disagree over what parties and documents are essential to this action, and whether these witnesses and evidence will be available to this court. Likely witnesses located in the United States are the plaintiffs, additional family members of the deceased, and any physicians who treated the injured plaintiff Kramer once he returned to the United States. Potential witnesses located in Egypt include past and present IHC employees, as well as Egyptian government officials who were either eyewitnesses to the shooting or were involved in designing the hotel security measures. Any documents generated by the Egyptian government when constructing general security guidelines for the country's hotels and when investigating the shooting are presumably in Egypt. Other potential witnesses include additional hotel guests present during the shooting. Their whereabouts are uncertain, but due to the hotel's international

clientele, many eyewitnesses are likely located in neither the United States nor Egypt. In any event, both fora pose difficulties to at least some witnesses by requiring long-distance travel.

IHC stipulates that it is capable of requiring present IHC employees to testify at trial, but asserts that a New York court is incapable of compelling Egyptian government workers and former IHC employees to testify or to produce documents. (*See* Wallace Aff., P 35). IHC contends that this handicaps its efforts to present an adequate defense.

Defendant correctly states that Egypt is not a signatory to the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters ("Evidence Convention"). The Evidence Convention was designed to simplify and encourage interjurisdictional assistance in the gathering of evidence. Egypt's non-signatory status is not dispositive, however, because "courts need not turn to the Hague (Evidence) Convention in order to obtain information." Elliot M. Beard, *A Critical Analysis of the Effects of Colello v. Secon International*, 7 Duke J. Comp. & Int'l L. 271, 272 (Fall 1996). The Evidence Convention merely provides "a shorter method of obtaining evidence without proceeding through the more difficult diplomatic channels." Charles M. Routh, *Dispute Resolution in International Trade*, 395 A.L.I. 675, 695 (1989). When the Evidence Convention is inapplicable, United States courts can still obtain evidence located abroad through alternative methods, outlined in the Federal Rules of Civil Procedure. *See Societe Nationale Industrielle Aeropostale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522, 537, 96 L. Ed. 2d 461, 107 S. Ct. 2542 (1987).

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Regarding the availability of Egyptian documents in a United States trial, both Egypt and the United States have adopted the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents ("Service Convention"), which facilitates international service of process. Federal Rule 4(f) of Civil Procedure instructs courts to serve process upon individuals in foreign countries according to the Service Convention. Regarding testimony of foreigners, Rule 28(b) provides for depositions in foreign countries. On a practical note, however, the rules providing for sanctions for failure to comply with discovery requests or subpoenas do not apply to foreigners. *See* Fed R. Civ. P. 37 and 45; *See Pain v. United Technologies Corp.*, 205 U.S. App. D.C. 229, 637 F.2d 775, 787, n.56. As for the Egyptian government and its instrumentalities, such as the Tourist Police and the Ministry of Interior, the same limitations prevent a United States court from compelling cooperation. 28 U.S.C. § 1608 provides for service of process upon foreign states, but, like the Federal Rules, this statute does not provide for penalties in the event of non-compliance.

Plaintiffs contend that because there is no factual dispute as to the gunman's entrance, Egyptian government officials and police are not essential witnesses in this case. (Affidavit of Barry W. Horowitz, counsel for plaintiffs, sworn to on August 16, 1996 ("Horowitz Aff."), P 3). They also dispute the need to call former IHC workers, because they believe any testimony they would offer would be cumulative. *Id.* A significant issue is present, however, regarding whether the security employed by IHC constituted a failure to exercise reasonable care in light of the circumstances of the shooting. If former IHC employees and Egyptian government officials

refuse to cooperate, in reality, it would be difficult, if not impossible, for a United States court to compel them to do so. In this event, IHC will be at a great disadvantage when attempting to present its facts if trial took place in the United States.

Therefore, the burden on the American plaintiffs and witnesses if forced to pursue this litigation in Egypt is high, and the burden on defendants and Egyptian witnesses if this suit remains in the United States is also high. In sum, neither forum has the clear advantage regarding availability of documents and witnesses.

Other private interests, however, favor Egypt. Should "viewing of the premises" become appropriate, Egypt would clearly be the more convenient forum. A remaining question concerns whether the defendant is able to implead the Egyptian government in this forum. *HN9* The "inability to implead third party defendants is a factor weighing against the retention of jurisdiction." *Doe v. Hyland Therapeutics Div.*, 807 F. Supp. 1117, 1126 (S.D.N.Y. 1992). Inability to implead third party defendants forces defendants to file separate actions and may result in inconsistent verdicts. *See Gomez v. Banco Bilbao Vizcaya, S.A.*, 1993 U.S. Dist. LEXIS 7566, 1993 WL 204990, at *4 (S.D.N.Y. 1993).

IHC has represented that the Egyptian government's involvement in the Semiramis Hotel's security makes the government a potential third-party defendant. (Memorandum of Law in Support of IHC's Motion to Dismiss ("IHC Mem.") at 14). Under the Foreign Sovereign Immunities Act ("FSIA"), a foreign state is immune from the jurisdiction of

United States courts, with certain exceptions. 28 U.S.C. § 1604-07. Generally, a foreign state is immune from suits involving public activities, but may be sued for actions arising out of their commercial activities. *See* 28 U.S.C. § 1605. Defendant has stated that the owner of the Semiramis Hotel, the Semiramis Hotels Company, S.A.E., is partially owned by the Egyptian government. (Wallace Aff., P 16). It appears, however, that any involvement of the Egyptian government in this action would be grounded in the state's participation in designing security measures for all Egyptian hotels, independent of Egypt's commercial stake in the Semiramis. I note that if the trial is held in this court and IHC attempts to implead the Egyptian government, the Egyptian government would likely be immune under the FSIA.

Based on my analysis of the private interests at issue, I conclude that Egypt offers only a slight advantage over the United States; at this stage of the inquiry, I would hesitate to order dismissal in light of the deference owed to an American plaintiff's choice of a United States forum. Fortunately, this case presents a clearer case for dismissal when all the relevant factors have been considered.

III. "Public Interest" Factors Favor Suit in Egypt

The Gulf Oil analysis does not conclude after a balancing of the private interests at issue; it also includes a calculation of public interest factors. In this case, as discussed below, those factors decisively favor dismissal so that the parties can pursue the present action in an Egyptian court. First, it is undisputed that the Southern District of New York is heavily

overburdened. *See In Re Union Carbide Gas Plant Disaster*, 809 F.2d 195, 201 (2d Cir. 1987) (noting that trial in the Southern District would further congest an "already overburdened court,") *cert. denied*, 484 U.S. 871, 108 S. Ct. 199, 98 L. Ed. 2d 150 (1987). This prong of the "public interest" analysis favors dismissal.

Moreover, I am hesitant to burden a local jury with this litigation. This controversy involves plaintiffs domiciled in New Jersey and Maryland. While IHC maintains an office and several hotels in New York, this case revolves around a shooting in Cairo and security decisions made in both Cairo and London. New York jurors should not be required to judge such distant occurrences.

The interests of local jurors is closely related to what the Gulf Oil court referred to as the "local interest in having localized controversies decided at home." *Gulf Oil*, 330 U.S. at 508. New York has some interest in this case due to IHC's operations of an office and unrelated hotels in New York, and the United States has a strong interest in ensuring that its citizens can travel and conduct their affairs abroad safely.

Egypt also has a great interest in protecting the lives of its own citizens. In fact, two Egyptians suffered injury in the attack at issue. Egypt also has a strong interest in protecting its tourists. Tourism, until recently a great source of revenue for Egypt, has dropped dramatically due to violence directed at foreigners. (Horowitz Aff., Ex. I). This litigation will turn upon whether IHC, in cooperation with the Egyptian government, provided adequate protection in a hotel located in Egypt. Whatever the outcome, Egypt has a stronger interest in the present action than does any other forum.

Appendix F

Another public interest factor concerns the appropriateness of trying a case in a forum familiar with the governing law. If this case remains in this court, I must then determine the applicable law in accordance with New York's choice of law rules. New York courts apply the law of the jurisdiction with the most significant interest in, or relationship to, the dispute. *See Brink's Ltd. v. South African Airways*, 93 F.3d 1022, 1030 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 959, 136 L. Ed. 2d 845, 1996 WL 745051 (1997). In this action, weighing the comparative interests of the fora would likely result in the application of Egyptian law. "While the court need not definitively resolve the choice of law issue at this point, the likelihood that foreign law will apply weighs against the retention of the action." *Ioannides v. Marika Maritime Corp.*, 928 F. Supp. 374, 379 (S.D.N.Y. 1996). Egyptian courts have a strong interest in supervising the application of Egyptian law, so this prong further contributes to the other factors favoring Egypt as a forum.

The strongest public interest favoring suit in Egypt is the fact that two related lawsuits are currently pending there. As indicated earlier, the families of the other two hotel guests who were killed during the attack have filed suit in Egypt. "Related litigation pending in the proposed transferee forum is a factor that weighs heavily in favor of transfer (under 28 U.S.C. § 1404(a))." *Coultman v. National Railroad Passenger Corp.*, 857 F. Supp. 231, 235 (E.D.N.Y. 1994) (citing *National Union Fire Ins. v. Turtur*, 743 F. Supp. 260, 263 (S.D.N.Y. 1990)). The reason for this is because "the litigation of related claims in the same tribunal results in more efficient conduct of pretrial discovery, saves witnesses time and money in both trial and pretrial proceedings, and

avoids duplicative litigation and inconsistent results, thereby eliminating unnecessary expense to the parties while at the same time serving the public interest." *River Road Int'l, L.P. v. Josephthal Lyon-Ross, Inc.*, 871 F. Supp. 210, 214 (S.D.N.Y. 1995) (quoting *National Union Fire Ins.*, 743 F. Supp. at 263).

Clearly, the pending suit in Egypt filed by the families of additional victims of the shooting involves very similar, if not identical, claims, evidence, and witnesses. These are two cases that "hinge upon the same factual nuclei," which tips the balance toward Egypt as the proper forum. *Dahl v. Hem Pharmaceuticals Corp.*, 867 F. Supp. 194, 197 (S.D.N.Y. 1994) (quoting *Berg v. First Am. Bankshares, Inc.*, 576 F. Supp. 1239, 1243 (S.D.N.Y. 1983). In light of the pending suit in the alternate forum, dismissing this case in favor of Egypt is the more efficient result. *See Ocean Shelf Trading, Inc. v. Flota Mercante Grancolombiana S.A.*, 638 F. Supp. 249, 252 (S.D.N.Y. 1986) (stating a pending action in Colombia was a factor weighing in favor of dismissing suit on forum non conveniens grounds); *C-Cure Chem. Co. v. Secure Adhesives Corp.*, 571 F. Supp. 808, 822 (W.D.N.Y. 1983) (stating duplication of legal efforts in pending case in Canada weighed strongly in favor of dismissal).

Because the present plaintiffs filed their suit on October 20, 1995, and the suit in Egypt was filed on December 3, 1996, I must address the "first-filed" rule. Other courts in this district have held that "where there are two competing lawsuits, [the forum of] the first suit should have priority [over the second suit's forum], absent the showing of a balance of convenience . . . or special circumstances" when

considering transfer motions. *River Road Int'l L.P.*, 871 F. Supp. at 214 (quoting *Manufacturers Hanover Trust Co. v. Palmer Corp.*, 798 F. Supp. 161, 166 (S.D.N.Y. 1992)). Despite this rule, "the Court's focus in deciding whether to transfer this action remains overall convenience and efficiency in the administration of justice." *River Road Int'l L.P*, 871 F. Supp. at 214-15 (quoting *Rolls-Royce Motors, Inc. v. Charles Schmitt & Co.*, 657 F. Supp. 1040, 1061 (S.D.N.Y. 1987)). The interest factors as a whole may prevail over the "first-filed" rule in the interest of convenience, efficiency, and justice. In the present case, the balance of factors including both private and public interests, clearly favor trial in Egypt and therefore dismissal is appropriate, despite the "first-filed" rule.

CONCLUSION

For the reasons set forth above, this action is dismissed, subject to defendant's agreement not to contest suit in Egypt. The Clerk of the Court shall mark this action "closed."

SO ORDERED:

Dated: New York, New York

July 17, 1997

LORETTA A. PRESKA, U.S.D.J

APPENDIX G — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING FILED MARCH 15, 2005

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

03-7668(L), 03-7684(con), 03-7686(con), 03-7688(con)

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 15 day of March two thousand five.

KAREN GUIDI, Individually and as Executrix of the Estate of Robert L. Guidi, EVE HOFFMAN, Individually and as Executrix of the Estate of Coby M. Hoffman, MERRILL KRAMER, LOIS KRAMER,

Plaintiffs-Appellants,

v.

INTER-CONTINENTAL HOTELS CORPORATION, a Delaware Corporation, INTER-CONTINENTAL HOTELS CORPORATION, a corporation of the United Kingdom, INTER-CONTINENTAL HOTELS & RESORT CORPORATION, SEMIRAMIS HOTEL CORP., SAISON HOLDINGS, B.V. SAISON CORPORATION,

Defendants-Appellees.

Appendix G

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellants Karen Guidi, et al. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,
Roseann B. MacKechnie, Clerk

By: s/ Tracy W. Young
Motion Staff Attorney